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### Close encounters of the third kind

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*Document Version*

Publisher's PDF, also known as Version of record

*Publication date:*

2013

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Wessel, R. A. (2013). *Close encounters of the third kind: the interface between the EU and international law after the Lisbon Treaty*. (SIEPS report; No. 8). Swedish Institute for European Policy Studies (SIEPS).

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Ramses A. Wessel

# **Close Encounters of the Third Kind**

The Interface between the EU and  
International Law after the Treaty of Lisbon



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International Law after the Treaty of Lisbon

– SIEPS 2013:8 –

Report No. 8  
December 2013

Published by the Swedish Institute for European Policy Studies  
The report is available at [www.sieps.se](http://www.sieps.se)  
The opinions expressed in the report are those of the author.

Cover: Svensk Information AB  
Print: EO Grafiska AB  
Stockholm, December 2013  
ISSN 1651-8942  
ISBN 978-91-86107-44-4

# Preface

In several ways, the European Union interacts with international law. Not only is the EU's existence based on a treaty concluded by its Member States, the latter have also endowed it with a legal personality and several competences to act on the global stage, particularly by way of concluding international agreements.

The Treaty on European Union, as modified by the Treaty of Lisbon of 2009, emphasizes that in its relations with the wider world, the EU shall uphold and promote its values and interests, but it shall also contribute 'to the strict observance and the development of international law, including respect for the principles of the United Nations'.

In this report, produced in the framework of the SIEPS research project entitled *The EU external action and the Treaty of Lisbon*, Professor Ramses Wessel analyses the manifold encounters between the EU and international law, in particular since the entry into force of the Lisbon Treaty.

Anna Stellingner  
Director

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

## **About the author**

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## List of abbreviations

CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ARIO	Articles on the Responsibility of International Organizations
EAEC	European Atomic Energy Community
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
EEAS	European External Action Service
EEC	European Economic Community
EU	European Union
FAO	Food and Agriculture Organization
FYROM	Former Yugoslav Republic of Macedonia
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
IFAD	International Fund for Agricultural Development
ILC	International Law Commission
ILO	International Labour Organization
MARPOL	International Convention for the Prevention of Pollution from Ships
NAFTA	North American Free Trade Association
NATO	North Atlantic Treaty Organization
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
REIO	Regional Economic Integration Organization
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNESCO	United Nations Economic, Social and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNODC	United Nations Office on Drugs and Crime
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
WFP	World Food Programme
WTO	World Trade Organization

## Executive summary

Although written from a legal perspective, this report aims to offer an accessible way into understanding the various ‘encounters’ between the EU and international law in the current, ‘post-Lisbon’ situation. The European Union is usually considered a special, or *sui generis*, organisation. Yet, without international law, the EU would not exist and would not be able to exercise its external actions. The 2009 Treaty of Lisbon further strengthened the position of the European Union in the global legal and political order. But the Union is not the sole international actor in Europe. Despite their EU membership, the Member States do not cease to be states.

The dynamic shift of external competences from the Member States to the EU frequently results in Member States facing diverging EU and international law obligations. It has been perfectly legitimate to conclude investment treaties with third states, but what if the competence in that area shifts from the Member States to the European Union – either because of a treaty modification or on the basis of a sudden exercise by the EU of an already existing competence? Obviously, third states are less interested in complex competence divisions within the EU, but Member States are confronted with a new situation.

In the post-Lisbon era in particular, the emerging picture reflects a struggle of the European Union to further develop its ‘international actorness’, while being restrained both by the principle of the conferral of competences (on the basis of which the Union only has those competences which have been conferred upon it) and by the necessity to follow the rules of international law. We are witnessing the further development of what could be called the third dimension of legal relations. Before the establishment of the European Communities at the end of the 1950s the (Member) States were in charge of their own external relations. They were fully (and exclusively) competent to conclude international agreements with other states. The creation of the European Communities brought about a second type of legal relation: part of the external relations became internal, in the sense that relations between Member States and with the Communities became subject to the rules in the Community (now Union) Treaties. In the area of external relations Member States had to share competences with the Community/Union or even lose former sovereign competences (for instance in the important area of international trade). The title of this report refers to the third kind of relationship: that between the European Union and the international legal order. This report highlights the variety of encounters of the EU with international law.

These encounters take place in relation to different issues. It is argued that the European Union can and should be assessed in terms of an international organisation. As an international organisation, the European Union is subject to international law in its relations with third states and other international organisations. There we would need to start from the presumption that the EU is bound by the international agreements to which it is a party as well as to the customary parts of international law. This points to the core difficulty of EU external relations: who represents the 'European interest' on the international scene – the EU or its Member States, and how do these actions relate to each other – are they coherent, mutually supportive, or perhaps contradictory? The European Union 'as an international actor' is often used as an umbrella term for a set of external policies, instruments and actors across a vast range of substantive domains. It also illustrates the ambiguity as to who is acting: the European Union alone, the EU Member States, or both simultaneously.

The report further revisits the alleged 'autonomy' of the EU in the light of classic and recent case law (including *Kadi*) on the effects of international law in the EU legal order. Given the global ambitions of the EU – in particular as reflected in the post-Lisbon Treaties – the question of the hierarchy of international and EU norms has become more relevant.

In order to act legally internationally, the Union needs instruments. International agreements are the EU's international law tools par excellence. They form the key legal instrument that allow the Union to play along in the global legal order and to establish legal relationships with third states and other international organisations. The revised treaties provide new procedures on how to negotiate and conclude international agreements, with roles for new actors such as the EU High Representative for Foreign Affairs and Security Policy. The procedures as well as the practice reflect the tension that still exists between the institutions, but also between the Union and its Member States. The latter is particularly clear in the case of mixed agreements, in areas where both the EU and the Member States have competences. In these areas, the 'duty of cooperation' is to guide the actions of both the Union and its Member States. Other types of agreements which result in encounters between the EU and international law include association, accession and withdrawal agreements or the accession to international organisations. At the same time, international law continues to play a role in the case of international agreements concluded by the Member States only.

In addition, three themes deserve special attention as they have gained in importance over the last few years: the international responsibility of the Union,

its extra-territorial immunity in case of law-suits in third states and the EU's new ambitions in the field of international diplomacy. These themes relate to the more visible position of the EU in the international legal order and the related ambitions in the post-Lisbon treaties.

By now it has become widely accepted that the EU as such may bear international responsibility for an internationally wrongful act. Yet, the EU is not a normal international organisation and the division of external competences is both complex and dynamic. One of the key questions is therefore how to divide the responsibility between the EU and its Member States. This question is relevant in relation to the international responsibility in the case of mixed agreements, but also when considering the responsibilities of the EU as a global security actor. Although most missions launched by the Union so far have been relatively modest in their size and objectives, even small-scale operations may give rise to a breach of international law or cause damage and injury to private parties. Yet holding EU missions accountable for their activities is hampered by a range of legal and practical difficulties.

The EU's increasing external activities also trigger the question of the organisation's immunity before international and foreign courts. While this issue is clearly under-researched, it is claimed here that the question will arise more frequently, given the current scope of the Union's external action.

The Lisbon Treaty also reveals the EU's new diplomatic ambitions through the establishment of the European External Action Service (EEAS), which has been called 'the first structure of a common European diplomacy'. Here we run into the question of the extent to which international law allows the EU to act as a diplomatic actor alongside states, given the fact that most international rules on diplomatic and consular law are based on inter-state relations. The question whether the EU can replace its Member States in diplomatic and consular relations should currently be answered in the negative, but it is clear that recent developments are rapidly changing things. It will be up to both the EU Member States and third states to accept a new role for the Union in this area.

The primary aim of the present report is not to contribute to the legal doctrinal discussion between lawyers on the many elements that make up the relationship between the EU and international law. This discussion takes place in the specialist journals and edited volumes in the field. Rather, this report opens up the relevant issues to a wider audience of academics and practitioners, who are not necessarily specialists in the subject. In that respect this

report mainly reflects the law as it stands. A key perspective is formed by the changes brought about by the Lisbon Treaty and the conclusion reveals how the Lisbon Treaty affects the relationship between the EU and international law, arguing that this treaty potentially contributes to a more coherent EU approach to international norms, albeit in an embryonic fashion.

[T]he Court affirmed the autonomy of the Union's legal order. [...] This does not mean, however, that the Union's municipal legal order and the international legal order pass by each other like ships in the night

EU Advocate General Miguel Poiares Maduro in his Opinion in the *Kadi* case.<sup>1</sup>

# 1 Introduction

The European Union is usually considered a special, or *sui generis*, organisation. This special status flows not only from the relationship with its Member States (which indeed differentiates it from other international organisations), but also from its position in relation to international law. In the early days in particular, the European Court of Justice tended to underline this special position by referring to the 'autonomous' legal order that was created, in which the relationship between the Member States was no longer primarily regulated by international law but by EU law. Indeed, the states were first and foremost *Member States*. Yet, without international law, the EU would not exist. It is based on a treaty concluded within the framework of international treaty law. At the same time, and keeping in mind the rule of *pacta tertiis nec nocent nec prosunt*, third states are in principle not bound by the EU treaty as to them it is an agreement between others.<sup>2</sup> This implies that in its external legal relations the EU will have to act under international law and will also have to respect its basic rules. Internally, however, this may lead to conflicting norms and over the years the Court of Justice of the European Union (CJEU) has had quite a task in finding solutions for these conflicts.

The 2009 Treaty of Lisbon further strengthened the separate position of the European Union in the global legal and political order. The current Treaties — the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) — reflect the ambitions of the Union to be an active global player.<sup>3</sup> Article 21(1) TEU, for instance, provides:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and en-

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<sup>1</sup> Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351. In this quote, 'Community' has been replaced by 'Union'. All ECJ case law can be found through <http://curia.europa.eu/>.

<sup>2</sup> This rule is laid down in Article 34 of the Vienna Convention on the Law of Treaties, adopted in Vienna on 22 May 1969 (hereinafter: VLCT): 'A treaty does not create either obligations or rights for a third State without its consent'.

<sup>3</sup> See also B. van Vooren, S. Blockmans and J. Wouters (Eds.), *The EU's Role in Global Governance: The Legal Dimension*, Oxford: Oxford University Press, 2013.

largement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

Similar wording can be found in Article 3(5) TEU, again underlining that the EU has moved well beyond being an organisation with a primarily internal focus. The EU has set itself the objective of contributing actively to key global problems.

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Other provisions reveal the Union's ambitions to consolidate its different foreign policy dimensions through the new European External Action Service (EEAS) and to further develop its own diplomatic network. Moreover, the attention accorded to the United Nations and its principles in the new EU treaties is overwhelming. In fact the United Nations is referred to not less than 19 times in the current EU treaties (including the Protocols and Declarations). Irrespective of the CJEU's judgment in the 2008 *Kadi* case (see below), the EU obviously regards many of its actions as being part of the global governance programme. The United Nations and its Charter are presented as the guiding legal framework for the EU in its external relations. Article 3(5) TEU mentions 'respect for the principles of the United Nations Charter' which are to be pursued by the EU as part of 'the strict observance and the development of international law'. As indicated above, similar wordings reappear in Article 21 TEU of the general provisions on the Union's external action: the promotion

of ‘multilateral solutions to common problems’ should be done ‘in particular in the framework of the United Nations’. Finally, as reflected in the Preamble to the Treaty on the Functioning of the European Union (TFEU), UN law not only guides the external relations of the Union, but also its association with its overseas countries and territories (compare Articles 198–204 TFEU). The Member States announced their intention to ‘confirm the solidarity which binds Europe and the overseas countries and desir[e] to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.’

The Union is not the sole international actor in Europe, however. Having become members of the EU, the Member States do not cease to be states. They have continued to conclude international agreements; not only with third states, but also among themselves (*‘inter se’*). The dynamic shift of external competences frequently results in Member States facing diverging EU and international law obligations. It has been perfectly legitimate for Member States to conclude investment treaties with third states, but what if the competence in that area shifts from the Member State to the European Union; either because of a treaty modification or on the basis of a sudden exercise by the EU of an already existing competence? Obviously, third states are less interested in complex competence divisions within the EU, but Member States are confronted with a new situation.

In the post-Lisbon era in particular, the emerging picture reflects a struggle of the European Union to further develop its ‘international actorness’, while being restrained both by the principle of the conferral of competences (on the basis of which the Union only has those competences which have been conferred upon it) and by the necessity to follow the rules of international law. We are witnessing the further development of what could be called the third dimension of legal relations. Before the establishment of the European Communities at the end of the 1950s the (Member) States were in charge of their own external relations. They were fully (and exclusively) competent to conclude international agreements with other states. The creation of the European Communities brought about a second type of legal relation: part of the external relations became internal, in the sense that relations between Member States and with the Communities became subject to the rules in the Community (now Union) Treaties. In the area of external relations Member States had to share competences with the Community/Union or even lose former sovereign competences (for instance in the important area of



international trade). The title of this report refers to the third kind of relationship: that between the European Union and the international legal order.<sup>4</sup>

The main aim of this report is to highlight the variety of encounters of the EU with international law. Its aim is not to contribute to the legal doctrinal discussion between lawyers on the many elements that make up these encounters. This discussion takes place in the specialist journals and edited volumes in the field. Rather, this report aims to open up the relevant issues to a wider audience of academics and practitioners, who are not necessarily specialists in the subject. In that respect this report primarily reflects the law as it stands.<sup>5</sup> A key perspective is formed by the changes brought about by the Lisbon Treaty and in the conclusion we will try and answer the question how the Lisbon Treaty affects the relationship between the EU and international law and to what extent this treaty contributes to a more coherent EU approach to international norms.

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<sup>4</sup> *Close Encounters of the Third Kind* is the title of the famous Steven Spielberg movie on encounters with a world outside our 'autonomous' planet which seems to be capable of controlling and defining our actions. See <http://www.imdb.com/title/tt0075860/>

<sup>5</sup> Earlier as well as forthcoming publications of the present author have been used as a source for parts of this report, in particular B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press 2014 (forthcoming) and E. Cannizzaro, P. Palchetti and R.A. Wessel (Eds.), *International Law as Law of the European Union*, Boston and Leiden: Martinus Nijhoff Publishers, 2011. References may be found throughout the text. Credits are due to the co-authors of some of the publications: Bart Van Vooren, Steven Blockmans, Christophe Hillion, and Aurel Sari.

## 2 The nature of the European Union as an international actor

### 2.1 An international organisation or something else?

Any report on the interface between the EU and international law is founded on the underlying premise that the European Union can have legal relations with third states (non-Member States) and other international organisations. Hence, that the EU is an international actor with a distinct legal existence just like the Member States, or international organisations such as the United Nations. What does it mean then to say that the European Union is an international actor?

When the 1957 Rome Treaty founded the European Economic Community, this new international organisation was explicitly given competence to conduct international trade relations through its common commercial policy, and to conclude international agreements through which it could associate itself with third countries. As European integration progressed, the EEC, later European Community and now European Union, acquired powers in other areas such as foreign and security policy, environmental policy, energy policy, and so on. How does this amalgam of international policies render the European Union an international actor? In political science literature there is a variety of definitions of the nature of the EU in the world, which commonly seek to categorise the 'kind' of power the Union exerts in its external relations: civilian power, soft power, normative power, and so on.<sup>6</sup> All these concepts usually argue that there is something distinctive about EU action in the world, an 'EU way' of conducting its international relations which is connected to the way post-World War II European integration itself has progressed: avoiding inter-state conflicts through integration on the basis of multilateral legally binding instruments. Other scholars do not seek to classify the EU normatively, and are content with the classification of the EU as quite simply being an entity which stands as a category of its own, e.g. a *sui generis* international actor which cannot be defined with any pre-existing terminology:

The EU is not an intergovernmental organization as traditionally understood, nor is it a partially formed state. While it is clearly a regional organization, its degree of integration, and the range of policy com-

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<sup>6</sup> See respectively H. Bull, 'Civilian Power Europe: A Contradiction in Terms?', *Journal of Common Market Studies*, No. 2, 1982, pp. 149-164; J. Nye, *Soft Power: The Means to Success in World Politics*, New York: Public Affairs, 2005, 191 p.; and I. Manners, 'Normative Power Europe: A Contradiction in Terms?', *Journal of Common Market Studies*, No. 2, 2002, pp. 235-258.

petences and instruments it possesses, render comparison with other regional organizations such as the North American Free Trade Agreement (NAFTA) meaningless.<sup>7</sup>

In this report on a legal relationship, we are primarily concerned with the rules and principles that govern the legal existence and functioning of this international actor. Consequently we define the EU as an international actor in abstract terms as an entity which interacts with third countries and international organisations (and even its own Member States) in ways that are legally and politically distinguishable from its constitutive Member States. In the global context, this entity thus has a independent identity composed of values, interests and policies which it seeks to define and promote internationally as its own.<sup>8</sup>

The term 'entity' may nevertheless not be too helpful to explain the nature of this 'beast' and the question emerges whether we can see the EU as an international organisation. To lawyers, being an international actor at least means being an international *legal* actor. This in turn means that, although the EU is not a state, it is subject to the rules of international law when it wishes to act on the global stage. International law, on the other hand, is still quite traditional. Created as 'inter-state' law, it continues to struggle with the presence of non-state actors in the international order.<sup>9</sup> Yet, international organisations obviously have found their place as international legal actors, and other fora and networks are also increasingly recognised as legally relevant.<sup>10</sup> It is a truism that the EU is not a regular international organisation. From the outset, Member States have been willing (or were forced) to transfer competences to the Community and later the Union. The current treaties again herald a new phase in which the EU's role as an international actor in the global legal order will be further developed.<sup>11</sup>

This is exactly why it is important to classify the EU under international law. Most international rules apply to states, some (also) to international organisa-

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<sup>7</sup> C. Bretherton and J. Vogler, *The European Union as a Global Actor*, New York: Routledge, 2006, at 2.

<sup>8</sup> Cf. M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', *Common Market Law Review*, 2004, pp. 553-573.

<sup>9</sup> Cf. M. Noortmann and C. Ryngaert (Eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers*, Burlington VT: Ashgate, 2012.

<sup>10</sup> A. Berman and R.A. Wessel, 'The International Legal Status of Informal International Lawmaking Bodies: Consequences for Accountability', in J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), *Informal International Lawmaking*, Oxford: Oxford University Press, 2012, pp. 35-62.

<sup>11</sup> Van Vooren, Blockmans and Wouters, *op.cit.*

tions and a limited set also to other internationally active entities (such as liberation movements or multinational corporations). Few would argue that the EU is a state;<sup>12</sup> many would say that it is an international entity *sui generis*. International law, however, only works when it is applied across the board for certain categories of international actors. While it may be possible to create special rules for *sui generis* entities (compare the clauses on Regional Economic Integration Organisations (REIOs) in some multilateral agreements<sup>13</sup>), the rationale behind a legal system is that its rules should allow for a smooth cooperation between the different subjects.

Unfortunately, the Treaty of Lisbon is not very helpful in this respect. Article 1 TEU merely refers to the fact that '[...] the High Contracting Parties establish among themselves a European Union' and that this Union 'shall replace and succeed the European Community'. Thus, it still does not give an answer to the classic question of whether the EU is an international organisation or something else. This may be the reason also why text books are still uncertain about the legal nature of the EU and seem to have a preference for more political notions. Chalmers *et al.* refer to the EU as 'amongst other things, a legal system established to deal with a series of contemporary problems and realise a set of goals that individual states felt unable to manage alone'.<sup>14</sup> The 'nature of the Union's international presence' is related to its international legal personality only, whereas the nature of the entity as such is left open.<sup>15</sup> In its famous ruling on the Lisbon Treaty, the German Constitutional Court held that the EU was 'designed as an association of sovereign states (*Staatenver-*

<sup>12</sup> Although it can be argued that there are close resemblances with federations such as Canada. Cf. the contributions to 'L'Union européenne comme fédération', chapter 2 in M. Benlolo-Carabot, U. Candas and E. Cujo, *Union européenne et droit international*, Paris: Editions Pedone, 2012, pp. 139-230.

<sup>13</sup> An REIO is commonly defined in UN protocols and conventions as 'an organization constituted by sovereign states of a given region to which its Member States have transferred competence in respect of matters governed by [...] convention or its protocols and [which] has been duly authorised, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned]'. See for example the 2004 Energy Charter Treaty (Art. 3). See also E. Paasivirta and P.J. Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organisations', *Netherlands Yearbook of International Law*, 2005, The Hague: T.M.C. Asser Press, 2007, pp. 169-226 at 205. In the new Convention on the Rights of Persons with Disabilities the REIO clause seems to have evolved to a RIO (Regional Integration Organization) clause, which does justice to the large scope of activities of the EU at the present time (see Art. 44: "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.")

<sup>14</sup> D. Chalmers, G. Davies and G. Monti, *European Union Law*, Cambridge: Cambridge University Press, 2010 (2<sup>nd</sup> ed.) at 3.

<sup>15</sup> *Ibid.* at 632.

*bund*) to which sovereign powers are transferred'. Yet, the further description by the Court comes close to generally accepted definitions of an international organisation:

The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, ie the citizens of the states, remain the subjects of democratic legitimisation.<sup>16</sup>

Indeed, the nature of the EU is mostly defined on the basis of internal considerations – not so much has been written on how it would be perceived by third states. A possible reason for this was presented by Tzagourias: 'By appropriating the instruments of its creation, the Union liberated itself from external – international – contingencies and also moved the source of its validation from the international legal order to the Union.'<sup>17</sup> Yet, irrespective of the inward-looking basis for its creation and its 'liberation' from international contingencies, the current ambitions of the EU reveal the need to exist and be recognised as an international legal entity that somehow fits the fundamental starting points of the international legal order.

Can the EU then be qualified as an international organisation? Well, when it looks like a banana and smells like a banana, it may very well be a banana. Indeed, many would agree with Curtin and Dekker 'that the legal system of the European Union is most accurately analysed in terms of the institutional legal concept of an international organization [...]'.<sup>18</sup> But even this quote reveals how difficult it seems simply to argue that the EU *is* an international

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<sup>16</sup> Entscheidungen des Bundesverfassungsgericht, 30 June 2009; available at [www.bundesverfassungsgericht.de/entscheidungen](http://www.bundesverfassungsgericht.de/entscheidungen). See also A. Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration', *German Law Journal*, 2010, p. 367.

<sup>17</sup> N. Tzagourias, 'Conceptualizing the Autonomy of the European Union', in R. Collins and N.D. White (Eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, London and New York: Routledge, 2011, pp. 339-352 at 340.

<sup>18</sup> D.M. Curtin and I.F. Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadow', in P. Craig and G. De Búrca (Eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, pp. 155-185 at 163.

organisation (albeit a very special one).<sup>19</sup> Throughout their handbook on the law of international organisations, Schermers and Blokker nevertheless take the EU along as an international organisation, while noting of course its ‘far-reaching forms of cooperation’ and the ‘supranational features’.<sup>20</sup> The EU is indeed ‘considered special not because of its identity problems but because of the high degree of “constitutional” development, supranational components and the rule of law features within this organization making it look almost like a federation of states [...]’, as argued by Bengoetxea in one of the few publications focussing on this question.<sup>21</sup>

As an international organisation, the European Union is subject to international law in its relations with third states and other international organisations. There we would need to start from the presumption that the EU is bound by the international agreements to which it is a party as well as to the customary parts of international law. As more recent developments show, international law is capable of taking the differences between states and international organisations into account (see for instance the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; or the 2011 Articles on the Responsibility of International Organizations).<sup>22</sup> Yet, third states (sometimes annoyingly) experience that the EU remains special. It may be an international organisation, but the fact that it is exclusively competent to act in certain areas is unprecedented, as is the rule that EU Member States feel that, in the end, they should give priority to EU law in cases of a conflict with international law.<sup>23</sup> Indeed, as also more recent case law underlines, the *Gemeinschaftstreue* is believed

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<sup>19</sup> Compare the qualification as ‘eine internationale Organisation eigener Art’, by W. Schroeder, ‘Die Europäische Union als Völkerrechtssubjekt’, *Europarecht*, Beiheft 2, 2012, pp. 9–23 at 18. More in general, the status of the EU as an ‘international organization’ seems to be accepted implicitly by many authors. Cf. P. Eeckhout, *EU External Relations Law*, Oxford: Oxford University Press, 2011 (2<sup>nd</sup> ed.), who does not at all address the external legal nature of the EU, but merely refers to the fact that ‘[t]he EU is also a member of a number of *other* international organizations [...]’ (at 3, emphasis added).

<sup>20</sup> H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity in Diversity*, Leiden and Boston: Martinus Nijhoff Publishers, 2011, at 55 and 57.

<sup>21</sup> J. Bengoetxea, ‘The EU as (More Than) an International Organization’, in J. Klabbers and Å. Wallendahl, *Research Handbook on the Law of International Organizations*, Cheltenham UK and Northampton MA: Edward Elgar Publishing, 2011, pp. 448–465 at 449. The author argues that it is above all the ‘transitional’ status of the EU (from international organization to federation) that justifies its ‘specialness’ (at 450).

<sup>22</sup> Respectively to be found at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf); and [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_11\\_2011.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf). Obviously, the extent to which these instruments successfully take the complex position of international organisations into account may be subject to debate.

<sup>23</sup> See more generally J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009.

to take precedence over international law obligations.<sup>24</sup> While for EU Member States (and most EU lawyers) these may be logical consequences of a dynamic division of competences, third states (and most public international lawyers) would remind us of the rule of *pacta tertiis nec nocent nec prosunt*; third states are in principle not bound by the EU treaty as to them it is an agreement between others. From a legal (and most certainly also a political) perspective they should not be bothered with the complex division of competences that was part of a deal between the EU and its own Member States.

## 2.2 The EU and its Member States in the international legal order

Whereas the above discussion may seem like a purely semantic exercise, it points to the core difficulty of EU external relations: who represents the ‘European interest’ on the international scene – the EU or its Member States? And how do these actions relate to each other – are they coherent, mutually supportive, or perhaps contradictory? The EU ‘as an international actor’ is often used as an umbrella term for a set of external policies, instruments and actors across a vast range of substantive domains. It also illustrates the ambiguity as to who is acting: the EU alone, the EU Member States, or both simultaneously.

As we will see, the Treaty of Lisbon has certainly strengthened the EU’s ‘international actorness’. Article 47 TEU now confirms the separate legal status of the EU by confirming that ‘The Union shall have legal personality’. From a legal perspective it indeed makes sense to continue distinguishing between the EU as an international organisation of which states can be members, and the (member) states themselves. In that sense the EU is clearly something different from the collection of 28 states. It has a distinct legal status, both in relation to its own members and towards third states. The EU as an international actor then refers to the entity which has express legal personality and capacity to act in the international legal order. What is then characteristic of this international actor, and what makes some define it a ‘*sui generis*’ international actor, is that the EU is neither a state with ‘full international powers’, nor is it a traditional international organisation whose powers are subject to

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<sup>24</sup> Examples include the *Open Skies* cases (e.g. Case C-469/98, *Commission v. Finland*), *BITs* cases (Cases C-205/06, *Commission v. Austria*; C-249/06, *Commission v. Sweden*; C-118/07, *Commission v. Finland*), or the *PFOS* case (Case 246/07, *Commission v. Sweden*). From a more constitutional point of view, similar arguments that international law should be applied in a way that would not harm the constitutional principles of the EU legal order were made in the *Kadi* case (Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*).

the will of its members. Yet, like any other international organisation, the EU is based on the principle of conferred powers, e.g. it can only act where its Member States have given it the competence to do so. But, importantly, the Member States may no longer be allowed to act once competences have been transferred and have been placed 'exclusively' in the hands of the Union. As a consequence, depending on the legal existence, scope and nature of the EU's external powers (a synonym for competence), the Member States have to a lesser or greater degree a prominent role in the formation and execution of international action in the relevant area. Conversely, the role of the EU (as the legal person) and its supranational institutions will then shift depending on the policy area at issue. This is why it possesses significant legal competences and political clout which is distinct from that of its Member States. However, it is not a state, and its Member States remain equally significant on the international scene. The relationship between the EU and international law is based on this phenomenon and the Treaty of Lisbon has maintained this ambiguity, which continues to make it difficult to live up to the demands of coherence and consistency in its external relations policy, which can be found throughout the treaties (e.g. Article 21(3) TEU).



## 3 The relationship between EU law and international law

### 3.1 An autonomous legal order...?

#### 3.1.1 ...or international law as an integral part of the EU legal order?

Irrespective of the clarified international status of the EU on the basis of the Lisbon Treaty, the relationship between the EU legal order and international law has been with us from the outset. A striking tension underlies the many judicial cases on the effects of international law in the EU legal order: the EU's struggle to find solutions between autonomy and dependence.<sup>25</sup> To make certain key principles of EU law (including 'primacy' and 'direct effect') work, the EU needs to stress its autonomous relation *vis-à-vis* international law. At the same time, as an international actor, there is a need for the EU to live up to most of the rules that make up the international legal order.

More recently, in the *Kadi* cases both the CJEU and the General Court have felt obliged to stress the EU's autonomous legal order on the question of whether the EU should be bound by UN Security Council resolutions: 'the institutions [...] had no *autonomous* discretion [in relation to UNSC resolutions]' (Case T-315/01) and 'the validity of any Community measure [...] must be considered to be the expression [...] of a constitutional guarantee stemming from the EC Treaty as an *autonomous* legal system' (Case C-402/05P). The notion of 'autonomy' was even a central element in the discussion between the CJEU and the General Court in the *Kadi* saga when the latter argued: 'the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly *autonomous* legal order, not subject to the higher rules of international law [...]' (Case T-85/09).<sup>26</sup>

'A wholly *autonomous* legal order, not subject to the higher rules of international law.' Phrases like these are meant to indicate that the EU as such is not automatically bound by international law. They seem to suggest the dualism that many Member States are familiar with: international law can only be part of a domestic legal order once it has been transformed or incorporated into that legal order. Yet, the legal order of the EU is widely identified as 'monist'

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<sup>25</sup> R.A. Wessel and S. Blockmans (Eds.), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations*, The Hague: T.M.C. Asser Press/Springer, 2013.

<sup>26</sup> Emphasis added in all sentences.

in its relation to public international law (see below).<sup>27</sup> Indeed, in practice the EU does not seem to have a problem with allowing binding international norms to become part of its legal order.

From the outset the novel and special nature of the European Union (then the European Economic Community) was stressed by the European Court. In *Van Gend & Loos* (Case 26/62) the Court held ‘that the Community constitutes a *new legal order of international law* for the benefit of which the states have limited their sovereign rights [...]’.<sup>28</sup> In *Costa v. ENEL* (Case 6/64) the Court further stressed the ‘special’ nature of the EU: ‘By contrast with *ordinary* international treaties, the EEC Treaty has created its own legal system [...]’.<sup>29</sup> It can now be concluded that the phrase ‘a new legal order of international law’ is not without importance.

In the early case law the need to distinguish EU law from international law was above all triggered by the existence and development of the two notions that are so characteristic of EU law (and generally absent in international law): *primacy* and *direct effect*. Although over time the EU adopted a more relaxed attitude towards international law (see below), in more recent case law the Court has still frequently used the term ‘autonomy’ to indicate the need for the Union to live up to its own rules (and perhaps to preserve its own prerogatives). Thus, the ‘preservation of the *autonomy* of the Community legal order’ formed a crucial element in Opinion 1/00 on the possible establishment of a European Common Aviation Area. Similar references could already be found in Opinion 1/76 (on the possible establishment of a European laying-up fund for inland waterway vessels) and Opinion 1/91 (on the creation of the European Economic Area). The safeguarding of the EU’s judicial system was at stake in the *Mox Plant* (Case C-459/03) when the Court held that ‘[...] an international agreement cannot affect [...] the *autonomy* of the Community legal system [...]’.

Indeed, after an initial period in which the European Court laid emphasis on a strengthening of the autonomous nature of the Community, beginning in the early 1970s, the Court indicated that this does not imply that international treaties are not to be considered a part of EU law. It was in the *Haegeman*

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<sup>27</sup> See for example: P. Pescatore, ‘Die Rechtsprechung des Europäischen Gerichtshofs zur gemeinschaftlichen Wirkung völkerrechtlicher Abkommen’, in Festschrift für H. Mosler, *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit Menschenrechte*, Berlin, 1983, p. 661, at 680; H. Schermers, ‘Community Law and International Law’, *Common Market Law Review*, 1975, p. 83.

<sup>28</sup> Emphasis added.

<sup>29</sup> Emphasis added.

case<sup>30</sup> that the Court presented the famous phrase that international agreements concluded by the EU form ‘an integral part of Union law’. As we will see, this status of international law is not restricted to international agreements (including mixed agreements), but also holds true for customary law, and secondary international law deriving from international agreements such as Association Council decisions.<sup>31</sup>

The Lisbon Treaty does not address the hierarchy between EU and international law as such. Accepting that international law forms part of the EU legal order raises the question of where to place it in the EU’s hierarchy of norms. The Court has frequently dealt with this question and concluded that international law ranks between primary and secondary law.<sup>32</sup> This leads to the following hierarchy:

The EU Treaties

International law binding upon the EU

Decisions adopted by the EU.

Obviously, this hierarchy could work internally, but it raises problems in relation to obligations both the Member States and the EU may have *vis-à-vis* third states. In the *Kadi* case the CJEU was challenged to square UN Security Council obligations with the protection of fundamental rights as part of the general principles of law to be ensured by the Court. In this case the Court held that the obligations imposed by an international agreement (in this case the UN Charter) could not have the effect of prejudicing the constitutional principles of the EU Treaty. Thus it followed the hierarchy presented above.

### 3.1.2 The Kadi case: hierarchy settled?

On 3 September 2008 the CJEU delivered its judgment in the so-called *Kadi* case.<sup>33</sup> This judgment may be seen as having an impact on the traditional monist approach of the EU towards international law and hence on the way we look at hierarchy in the international legal order. With regard to the question of whether or not UN Security Council Resolutions should enjoy immunity from jurisdiction as to their lawfulness in the Community legal order, the Court held

that the Community judicature must [...] ensure the review, in principle the full review, of the lawfulness of all Community acts in the light

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<sup>30</sup> Case 181/73, *R. & V. Haegeman v. Belgian State*.

<sup>31</sup> See for instance: Case C-192/89 *Sevince v. Staatssecretaris van Justitie*.

<sup>32</sup> See for instance: Case C-179/97 *Spain v. Commission*; Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz*, para 45.

<sup>33</sup> Case T-306/01, *Yusuf and Al Barakat International Foundation v. Council and Commission* (see also Case T-315/01, *Kadi v. Council and Commission*), 21 September 2005.

of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.<sup>34</sup>

In this case the acts of the European Union and the European Community<sup>35</sup> were to be seen as a direct implementation of Security Council Resolution 1267 (1999).<sup>36</sup> Yassin Abdullah Kadi was one of the persons on the UN list of individuals and entities associated with Osama bin Laden or the Al-Qaeda network and hence appeared on the EU's list as well. In 2001 Kadi, together with Ahmed Yusuf and the Al Barakaat Foundation, filed an action with the General Court (then the Court of First Instance of the European Communities (CFI)), claiming that the Court should annul the implementing EC and EU acts which brought them within the scope of the sanctions.<sup>37</sup> While the CFI in its judgment in 2005 agreed with the applicants that in the current anti-terrorism cases there is 'no judicial remedy available' (para 340), it concluded the following:

276. It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply

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<sup>34</sup> Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008, Para 327. See also S. Griller, 'International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*', *European Constitutional Law Review*, No. 3, 2008, pp. 528-553.

<sup>35</sup> Respectively EU Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, OJ L 139/4, 29.5.2002; and Regulation (EC) No. 881/2002 imposing certain specific restrictive measurements directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJ L 139/9, 29.5.2002.

<sup>36</sup> Resolution 1267 (1999) provides that all the States must, in particular, 'freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need' (para 4b).

<sup>37</sup> Cases T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* and T-315/01, *Kadi v. Council and Commission*.

that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

277. None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

While many lawyers pointed to a ‘legal protection deficit’ which thus became apparent (if both EU courts and domestic courts were unable to review the UN measures, where could plaintiffs go?), others were more worried about the part of the judgment in which the Court claimed to be competent to determine the lawfulness of the resolutions of the Security Council with regard to *jus cogens* (the notion describing those fundamental norms of international law which cannot be deviated from). Although the Court came to the conclusion that none of the allegedly infringed rights formed part of *jus cogens*, the very idea of a regional Court checking the validity of UN Security Council resolutions proved to be a source of heated academic debate.

In that respect, the appeal judgment of the CJEU in the *Kadi* case<sup>38</sup> could be seen as another step in this debate as it basically reversed several findings of the General Court. Most importantly, the CJEU found that the General Court (then the CFI) had erred in law when it held that a regulation designed to give effect to UN Security Council resolutions must enjoy immunity from jurisdiction as to its internal lawfulness save with regard to its compatibility with the norms of *jus cogens*. This case has become essential to understand the relationship between EU law and international law. The Court held as follows:

283. In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collabo-

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<sup>38</sup> Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*. The cases have received abundant attention in the academic literature. See for instance G. De Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’, *Harvard International Law Journal*, No. 1, 2010, pp. 1-49. Cf. also the special ‘Forum’ on the *Kadi* judgment, in *International Organizations Law Review*, 2008.

rated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I5305, paragraph 29 and case-law cited).

284. It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C112/00 *Schmidberger* [2003] ECR I5659, paragraph 73 and case-law cited).

285. It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

286. In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

To arrive at this conclusion without having to challenge the validity of norms flowing from UN Security Council resolutions, the Court pointed to the fact that the UN Charter leaves the members ‘the free choice among the various possible models for transposition of those resolutions into their domestic legal order’ (para 298). This would allow for judicial review of the ‘internal lawfulness’ of the EU and EC acts, keeping in mind that fundamental rights form an integral part of the general principles of law, the observance of which is to be ensured by the Court.

Although the Court’s focus was on the *implementation* of the Security Council resolutions by the Union and the Community, rather than on the validity of the international norms as such, the consequence of this exercise could very well be that any implementation of a Security Council resolution could entail the violation of fundamental EU rights. In this concrete case the Court annulled the contested acts (while maintaining the legal effects for three

months).<sup>39</sup> Rather than taking the formal hierarchical relationship between UN law and EU law as the basis for establishing the immunity from jurisdiction of Security Council resolutions (as was done by the CFI), the Court chose to look at this hierarchy in more substantive terms. Security Council resolutions remain ‘untouchable’, but the acts by which the EU implements the resolutions are not and are subject to the fundamental rights and principles that form the basis of the Union legal order. This certainly offered the Court a smart way out of the dilemma, but in the virtual absence of judicial remedies at the UN level, the consequence can (and perhaps should) be that the EU may not be able to fully implement Security Council resolutions that are in conflict with fundamental human rights obligations flowing not only from the EU legal order and the European Convention for the Protection of Human Rights and Fundamental Freedoms, but also from the UN Charter itself.

### 3.2 A monist or dualist relationship?

As noted above, the Treaty of Lisbon does not settle the relationship between EU law and international law and we have to rely on case law to understand this relationship better. The terms ‘monism’ and ‘dualism’ are generally used to characterise the relationship between domestic legal orders and international law. Although in their extreme form both notions cannot be found in practice, a monist system regards international law as being part of the national legal order, whereas in a dualist system international rules need to be ‘translated’ to national law before they can be recognised as valid law. Although labelling the relationship between international and European law in terms of ‘monism’ may be helpful to indicate that international law forms part of the EU legal order from the moment an international norm is (lawfully) concluded, it has been pointed out that it may raise questions as well. The above findings – and the *Kadi* case in particular – reveal the tension

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<sup>39</sup> See para 375: ‘Having regard to those considerations, the effects of the contested regulation, insofar as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC, be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants’ rights and freedoms.’ The only action taken was not by the Council itself, but by the Commission, which on 28 November 2008 (five days before the deadline) adopted Regulation (EC) 1190/2008 (OJ L 322/25, published 2.12.2008, one day before the deadline). In this decision the Commission claims that it has communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee, to Mr Kadi and to Al Barakaat International Foundation and given them the opportunity to comment on these grounds. The comments received from Mr Kadi and Al Barakaat formed a reason for the Commission to conclude the listing was justified.

between the principles of ‘autonomy’ and ‘reception’<sup>40</sup> that together form the cornerstones of the relation between European and international law.<sup>41</sup> At the same time the analysis points to the limited explanatory power offered by an application of the notions of monism and dualism. If we wish to understand what it means for international law to form an integral part of Union law – in terms of validity, direct effect and supremacy (see below) – we may need more sophisticated theoretical tools. In times when the relationship between international law and Union law seems to be under construction, it is worthwhile to know where we stand.

A number of issues may be addressed in this respect. First of all, the complexity of the Union’s legal order is related to the role of the Member States in this order. When the fact that international agreements are an ‘integral part’ of Community law is linked to the notion of primacy, the effects of international agreements reach the internal law of (both monist and dualist) Member States and would lead to a supremacy over this law. This has led one observer to point to European law as a ‘door opener’ for international law, ‘In that event, the traditional approaches of the Member States for explaining the relationship between municipal law and public international law do not matter anymore.’<sup>42</sup> At the same time the status as an ‘integral part’ of Union law does not settle the hierarchical position of international law in relation to other sources of Union law.

Secondly, ‘monism’ and ‘dualism’ are often used to describe the relationship between legal orders in far too general terms. Claims based on ‘monism’ often confuse the ‘validity’ of norms with their ‘direct applicability’, ‘direct effect’ or even their ‘supremacy’. Yet, at least at a theoretical level, it may still be helpful to differentiate between the different notions. ‘Monism’ and ‘dualism’ would relate formally only to the status of international norms within the European or domestic legal orders. In that sense, ‘monism/dualism’ relates to the ‘validity’ (or existence) of international norms in those orders. In monist systems, international norms enjoy automatic validity, whereas in dualist systems, they need to be transferred into domestic law in order to become valid. The fact that international agreements are an ‘integral part’ of EU law seems

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<sup>40</sup> See on this issue J.W. van Rossem, ‘The EU at Crossroads: A Constitutional Inquiry into the Way International Law Is Received within the EU Legal Order’, in E. Cannizzaro, P. Palchetti and R.A. Wessel (Eds.), *International law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers, 2012, pp. 59-92.

<sup>41</sup> *Ibid.*

<sup>42</sup> F.C. Mayer, ‘European Law as a Door Opener for Public International Law?’, in *Droit international et diversité des cultures juridiques – International Law and Diversity of Legal Cultures*, Paris: Pédone, 2008, pp. 241-255, at 253.



to relate to this idea. Hence, the existence of international norms should not be equated with the question of whether they can be invoked by individuals before a court of law, let alone with the question of whether they would be of a hierarchical higher order in case of a conflict with a domestic or European norm. Article 216(2) TFEU provides that international agreements are 'binding', but it does not offer a priority rule to solve a conflict with other 'binding' (Union) norms. In fact, the Court held that 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, *so far as possible*, be interpreted in a manner that is consistent with those agreements'.<sup>43</sup> This shows that the validity (existence within the EU legal order) of international norms does not automatically lead to supremacy of those norms.

Thirdly, as will also be addressed below, this validity does not imply a direct effect, in the sense that the international norms (as part of the EU legal order) may be invoked to challenge existing, conflicting Union law. The classic example is formed by WTO law, in which area the Court denied direct effect as a possibility of individuals to refer to WTO law, both before national courts and the European court.

The much analysed cases of *Yusuf* and *Kadi* may have given some answers,<sup>44</sup> but at the same time, they left many fundamental theoretical questions unanswered. In addition, the judgments even raised new questions in relation to the monist nature of the EU legal order. The effects of international agreements and international decisions were all quite clearly confirmed by the General Court when it argued that 'the Court is bound, so far as possible, to interpret and apply [Community] law in a manner compatible with the obligations of the Member States under the Charter of the United Nations'.<sup>45</sup> The notion of the monism (or perhaps even unity) of EU and international law was even more strengthened by the claim of the General Court that it was 'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including

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<sup>43</sup> Case C-61/94 *Commission v. Germany*, para 52.

<sup>44</sup> See in particular the contributions by C. Eckes, 'International Law as Law of the EU: The Role of the Court of Justice' (pp. 353-377) and A. Gattini, 'Effects of Decisions of the UN Security Council in the EU Legal Order'; and P. Palchetti, 'Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice' (pp. 379-394), in Cannizzaro, Palchetti and Wessel, *op.cit.*

<sup>45</sup> See para 276 in Case T-306/01 *Ahmed Ali Yusuf v. Council and Commission* and Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission*.

the bodies of the United Nations, and from which no derogation is possible.’<sup>46</sup> The idea must have been that ‘monism’ works both ways.

As we have seen the CJEU came to a different view in its appeal judgment. The intention was to give priority to EU law and to limit the effect of binding international norms. In his Opinion, AG Poiares Maduro already started to highlight the good old (‘dualist’?) notion of the autonomous EU legal order, by arguing that the relationship between international law and EC law ‘is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community’.<sup>47</sup> In turn, the CJEU held that ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights’ (para 285). Again, the Court did not clearly deny the legal nature (validity) of ‘an international agreement’.<sup>48</sup> To arrive at this conclusion without having to challenge the validity of norms flowing from UN Security Council resolutions, the Court pointed to the fact that the UN Charter leaves its members ‘the free choice among the various possible models for transposition of those resolutions into their domestic legal order’ (para 298). This would allow for a judicial review of the ‘internal lawfulness’ of the EU acts, keeping in mind that fundamental rights form an integral part of the general principles of law, the observance of which is also to be ensured by the Court.

As a fourth problematic area in relation to monism/dualism, we point to the division between the TEU and the TFEU. While the convergence of the Community and the Union legal order<sup>49</sup> reached an all-time high after the entry into force of the Lisbon Treaty, the status of international law in relation to the Union’s common foreign and security policy (CFSP) as well as the common security and defence policy (CSDP) may still differ from what has been established on the basis of the classic authorities in the case law on the policy fields that are now to be found in the TFEU.<sup>50</sup> The potential impact of the

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<sup>46</sup> Para 277.

<sup>47</sup> Opinion of AG Poiares Maduro in Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, para 21.

<sup>48</sup> But note the somewhat ambiguous reasoning in paras 305-308.

<sup>49</sup> R.A. Wessel, ‘The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation’, *European Constitutional Law Review*, 2009, pp. 117-142.

<sup>50</sup> On these policy areas see also the contributions by F. Naert, ‘The Application of International Humanitarian Law and Human Rights Law in CSDP Operations’ (pp. 189-214); P. Koutrakos, ‘International Agreements in the Area of the EU’s Common Security and Defence Policy’ (pp. 157-188), in Cannizzaro, Palchetti and Wessel (Eds.), *op.cit.*; and P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford: Oxford University Press, 2013.

loyalty principle on the freedom of the Member States, for instance under the Union's CFSP, should not be underestimated.<sup>51</sup> On the basis of the limited availability of case law related to CFSP no final conclusions can be drawn on the primacy, direct effect and justiciability of CFSP decisions and agreements. While there are good reasons to argue that CFSP agreements are also to be regarded as forming 'an integral part of Union law' (a statement that is less controversial now that new Article 216 TFEU does not discriminate between CFSP and other EU agreements), there are still different parts of 'Union law' and the monism/dualism approach may even be less helpful for understanding the internal effects of international agreements concluded by the EU because of the less developed nature of certain parts of the Union's legal order.

The above findings reveal that the Court's case law is not always very precise on the different elements of the relationship between international law and EU law. In this section we will revisit the relationship between international and EU law with respect to its three main dimensions: validity, direct effect and supremacy.<sup>52</sup> From a pragmatic perspective, this is what we need to know when confronted with conflicts between international and European law. From a more theoretical point of view, this may give us some more insight into the tool box that is, often implicitly, used to decide on the role of international norms in the Union's legal order.

A legal theoretical approach has frequently been used to study and understand the relationship between European and national law. As is well-known, the debate continues between those who view the domestic legal orders of the Member States as part of the EU legal order (and accept the overall supremacy of EU law) and those who cannot accept this view as it would deny the highest hierarchical position of the national constitution.<sup>53</sup> Less often, a similar exercise has been undertaken with regard to the relation between international and European law.

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<sup>51</sup> C. Hillion and R.A. Wessel, 'Restraining External Competences of EU Member States under CFSP', in M. Cremona and B. De Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 79-121.

<sup>52</sup> Cf. also B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in P. Craig and G. de Búrca (Eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, pp. 177-183.

<sup>53</sup> A. Tizzano, 'Quelques réflexions sur la doctrine du droit de l'Union européenne: les 'communautaristes' et les autres', in *Il diritto dell'Unione europea*, 2008, pp. 225-235.

### 3.2.1 The validity of international norms in the EU legal order

Validity refers to the *existence* of a norm in a particular legal order. It is difficult to leave the question of supremacy aside for a moment, but not impossible. Comparable to the position of national constitutional lawyers, who would perhaps opt for the model in which EU law is derived from national law and defines the relationship on the basis of constitutional choices (monism or dualism), many traditional EU lawyers would have a natural tendency to stress the autonomy of EU law and would only accept international law as valid once the Union itself decided that it is. From their point of view, Union law and the domestic law of Member States form an ‘integrated’ legal order (compare *Costa-ENEL*); at the same time, the ‘autonomy’ of the EU legal order makes it difficult to accept the same integration in relation to international law.<sup>54</sup> Nevertheless the notion of integrated legal orders seems to be at the basis of the recent judgments of the Court. Both in *Intertanko* and in *Kadi* – but also in the standing case law on the effects of WTO norms in the Community legal order – the Court faced a conflict of norms. From a theoretical perspective, it would be very difficult to accept a conflict without accepting the validity of both norms. Therefore, the notion that relevant (written and unwritten) international law forms an ‘integral part’ of Union law seems to be upheld by the recent cases, albeit that these cases equally make clear that it is EU law itself that sets the conditions for the validity of international norms within its legal order. Thus – as *Intertanko* for instance revealed in relation to the MARPOL treaty to which the EU is not a party – not *all* international norms can be an ‘integral’ part of the EU legal order.<sup>55</sup> Whereas the EU defines the status of its norms in the legal orders of its Member States, a similar system does not exist in the international legal order.

### 3.2.2 Direct effect of international norms

It is quite easy to combine validity with direct effect.<sup>56</sup> Article 93 of the Constitution of The Netherlands, for instance, even links the two notions explicitly: ‘Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become

<sup>54</sup> See already P. Pescatore, *Le droit de l'intégration. Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, Dordrecht: Martinus Nijhoff, 1972.

<sup>55</sup> This was in fact the main point of this case. See more extensively: J.W. van Rossem, ‘Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community’, in *Netherlands Yearbook of International Law*, 2009, pp. 183-227; also published as *CLEER Working Paper* 2009/4.

<sup>56</sup> On the close link between the two see also J. Klabbers, ‘International Law and Community Law: The Law and Politics of Direct Effect’, in *Yearbook of European Law*, 2002, pp. 292-295.

binding after they have been published.’ Although one may still argue that ‘binding on all persons’ does not by definition imply a right of these persons to actually invoke international provisions, practice reveals the close link between the two aspects. The *Intertanko* judgment in particular comes quite close to this idea by bringing in the argument that the international agreement ‘does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States [...]’ (para 64). However, in both cases (the Dutch and the European legal order), it would be difficult to argue on this basis that the absence of direct effect denies the ‘binding force’ of international agreements in the international legal order. This would imply that Member State and Union institutions would have a duty under international law to live up to their obligations, irrespective of the status of the agreements in their own legal order. The question of hierarchy may thus also emerge in the absence of direct effect.

### 3.2.3 Supremacy of international norms

The supremacy rule is nothing more (or less) than a rule to establish which norm takes precedence in case of a collision. With regard to a possible conflict between European law and international law, this rule is not articulated in the Lisbon Treaty. Article 216(2) TFEU does indeed refer to the fact that international agreements concluded by the EU are binding in the EU legal order, but remains silent on the hierarchy in relation to all other ‘binding’ norms within that order. One may argue that a hierarchy between legal orders can only be established once one legal order forms a part of the other. The hierarchy then implies that all norms in the higher (overarching) legal order take precedence over all norms in the lower (or sub) legal order. Exceptions to this rule can only be made through norms in the higher legal order.

The question of the subordination of the EU legal order to the international legal order has been raised ever since the CJEU held that the European Community was to be seen as ‘a new legal order of international law’.<sup>57</sup> In this new international legal order, legal norms may collide with other norms. One way to solve this collision may be by denying the direct effect of the international norms (as has traditionally been the approach with regard to WTO norms). The problem the CJEU faced in *Kadi* was that the norms set by the UN Security Council clearly had an effect on individuals. This left the Court with a conflict of norms. The Court seemed to conclude (although indeed not quite clearly) that international agreements (such as the UN Charter) form an ‘integral part’ of EU law, but also noted that ‘fundamental rights form an

<sup>57</sup> ECJ, Case 6/64, *Flaminio Costa v. ENEL*.

*integral part* of the general principles of law whose observance the Court ensures'.<sup>58</sup> The fact that both norms were part of the EU legal order allowed the Court to solve the supremacy question in an 'internal' setting, in which it gave priority to the constitutional principles related to the protection of fundamental rights.<sup>59</sup>

This underlines the complexity of the relationship between international and European law and the difficulty of analysing this relationship in terms of monism and dualism. In the end neither notion is very useful in understanding the (absence of) hierarchy between international and European law. In various legal analyses in reaction to the *Kadi* judgment, some of the arguments that are traditionally used by the '*communautaristes*' (or '*neocoms*') to stress the supremacy of EU law in relation to national law are now used to point to the need to accept the supremacy of international law over Union law. So, where EU law enjoys primacy over national law because without a uniform application it would lose its relevance, at least with respect to the nature and function of the Charter of the United Nations, it is argued that without the supremacy of the Charter and the decisions based on it (cf. Article 103 of the Charter), the United Nations system of collective security would not be able to function. So far, the controversy between the 'internationalists' (stressing the values of a coherent legal world order) and the 'European constitutionalists' (pointing to higher ranking constitutional values) could not be overcome on the basis of legal theoretical arguments. This seems to have triggered new approaches to make sense of the relationship between the different legal orders.<sup>60</sup>

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<sup>58</sup> Para 283; emphasis added.

<sup>59</sup> More in general, the 'internalisation' of international law has been referred to as a 'Europeanisation' of international law: 'To the extent that it is binding upon the EU institutions, international law become part of the EU legal order and is therefore "Europeanised"': J. Wouters, A. Nollkaemper and E. de Wet, 'Introduction: The "Europeanisation" of International Law', in their edited volume, *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, The Hague: T.M.C. Asser Press, 2008, pp. 1-13, at 3.

<sup>60</sup> See for instance E. Cannizzaro, 'The Neo-Monism of the European Legal Order', in Cannizzaro, Palchetti and Wessel (Eds.), *op.cit.*, pp. 35-58; and as an example of the 'pluralist' turn: N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford: Oxford University Press, 2010.

## 4 The European Union as a party to international agreements

### 4.1 The competence to conclude international agreements

International agreements are the EU's international law tools *par excellence* and the Lisbon Treaty streamlined the procedures to conclude them (see below, section 4.2). International agreements form the key legal instrument that allows the EU to have a place in the global legal order and to establish legal relationships with third states and other international organisations. If the EU lacked the competence to conclude international agreements, its external relations would be the object of study of political scientists and international relations experts only, and not so much of lawyers.

The Treaties have not always been very clear on the competence of the EU to conclude international agreements in certain areas, as they have also been less explicit on the division of competences between the Union and its Member States. Yet, as Eeckhout has rightfully claimed, international agreements may often be seen as a source of new legislation: 'Policy areas such as trade, development co-operation and environmental protection are obvious examples of areas of EU activity where much law-making effectively takes place by way of participation in international negotiations.'<sup>61</sup> International agreements, thus, are not only based on the EU Treaties, their content also contributes to the further substantive development of the EU legal order. This has, no doubt, been one of the reasons to extend the role of the European Parliament in the procedure for concluding international agreements. These days, international agreements are as much part of the 'European constitution' as other types of legislation.

The EU is a party to some 250 multilateral treaties, and even more bilateral agreements.<sup>62</sup> With increasing internal competences the scope of the Union's legal dealings with third states was extended to almost all areas covered by the Treaties. The EU's Treaties Database thus lists international agreements in the areas of Agriculture, Coal and Steel, Commercial Policy, Competition, Consumers, Culture, Customs, Development, Economic and Monetary Affairs, Education, Training, Youth, Energy, Enlargement, Enterprise, Environment, External Relations, Fisheries, Food Safety, Foreign and Secu-

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<sup>61</sup> P. Eeckhout, *EU External Relations Law*, Oxford: Oxford University Press, 2011 (2<sup>nd</sup> ed.), at 193.

<sup>62</sup> See the Treaties Office Database of the European External Action Service <http://ec.europa.eu/world/agreements/default.home.do>

ality Policy, Fraud, Information Society, Internal Market, Justice, Freedom and Security, Public Health, Research and Innovation, Taxation, Trade, and Transport. Numbers differ from 134 agreements in the trade area to one on culture.

#### 4.1.1 The legal nature of international agreements

International agreements are not defined by the Treaty of Lisbon. Article 216 TFEU merely provides the following:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Notwithstanding the absence of a definition (or perhaps exactly because of this), it is obvious that the term should be read in its international context and thus the international law definitions apply. The difficulty lies in the fact that the 1969 Vienna Convention on the Law of Treaties (Article 2 (1(a))) does not define international agreements either. Instead, it defines the concept of 'treaty' as follows:

'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designation.

As we will see, the international agreements concluded by the EU can be said to follow this description and are therefore 'treaties' in the sense of the Vienna Convention. The same may hold true for international contractual obligations that have not been given the heading of 'international agreement', but bear labels such as 'Convention' or 'Memorandum of Understanding'. Agreements may also be concluded in the form of an exchange of letters. As long as parties agree that they enter into a legal commitment, both EU procedures and international rules apply. This seems to have been confirmed by the CJEU when it described an international agreement as any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.<sup>63</sup> The fact that the 1969 Vienna Conven-

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<sup>63</sup> See *Opinion 1/75*, [1975] ECR 1355. See also Case C-327/91, *France v. Commission*, [1994] ECR I-3641, para 27.



tion refers to states only is solved by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, which contains a similar definition, taking into account the fact that international organisations may also conclude treaties.<sup>64</sup> Although the concluding procedure is ‘governed by EU law’ (as the conclusion of treaties is usually regulated in domestic law), there is no doubt that the final agreement between the EU and a third state or international organisation is governed by international law.

The use of the term ‘international agreement’ rather than ‘treaty’ therefore has no specific legal meaning, but at least it prevents confusion as in EU law the term ‘treaties’ is reserved for the TEU and the TFEU as well as for the accession Treaties. In other words, for primary EU law.

The internal binding nature of concluded international agreements is confirmed by Article 216(2) TFEU:

Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

The first part of this sentence follows from the international law concept of *pacta sunt servanda*, which is codified in the Vienna Convention (Article 26). This principle holds that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. This implies that the second part of Article 216(2) is not a reflection of that principle, as the Member States are not (necessarily) parties to agreements concluded by the EU. Member States are therefore bound on the basis of EU law, rather than on the basis of international law. Member States are bound by EU international agreements as in many cases the implementation of these agreements calls for Member State action. In a way, international agreements are similar to secondary legislation enacted by the EU and as an ‘integral part’ of the EU legal order they cannot be ignored by the Member States. Yet, as explained in the previous section, this does not automatically lead to supremacy and direct effect of all agreements concluded by the EU. While the status of international agreements within the EU legal order would perhaps lead to a *de facto* supremacy, the Court has not been willing to accept an automatic direct effect for all agreements.

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<sup>64</sup> See more extensively J. Klabbers, *The Concept of Treaty in International Law*, The Hague: Kluwer Law International, 1996.

#### 4.1.2 Express and implied competences

As we have seen, Article 216(1) TFEU provides for a competence of the EU to conclude international agreements in various circumstances:

- where the Treaties so provide
- where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties
- where the conclusion of an agreement is provided for in a legally binding Union act or
- where the conclusion of an agreement is likely to affect common rules or alter their scope.

Whereas the original Community Treaty did not include many explicit competences to conclude international agreements, the current Treaties list a number of areas in which the EU has an express competence to conclude international agreements: the readmission of illegal immigrants (Art. 79(3) TFEU); cooperation in research and technological development (Art. 186 TFEU); environmental policy (Art. 191(4) TFEU); common commercial policy (Art. 207 TFEU); development cooperation (Art. 209(2) TFEU); economic, financial and technical cooperation with third countries (Art. 212(2) TFEU); humanitarian aid (Art. 214(4) TFEU); association agreements (Art. 217 TFEU); the monetary union (Art. 219(1) and (3) TFEU); and common foreign, security and defence policy (Art. 37 TEU).

When the Treaties do not expressly provide for a competence, Article 216(1) TFEU points to the situations where conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties. The competence then follows from the parallelism between internal and external powers. Obviously, the discussion on whether or not an agreement is actually necessary becomes easier when the Treaties refer to the need for international cooperation in certain areas. This is for instance the case in relation to education and sport (Art. 165(3) TFEU), vocational training (Art. 166(3) TFEU); culture (Art. 167(3) TFEU) and public health (Art. 168(3) TFEU), where it is provided that the Union and its Member States shall foster cooperation with third countries and international organisations. Similar references may be found elsewhere in the Treaties, such as in Article 220(1) TFEU:

The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.

But the reference to the ‘objectives’ in the Treaties assures that in principle no area is excluded. As the need for an agreement may be subject to debate among institutions and Member States, it will finally be up to the Court to assess this issue.<sup>65</sup>

A third possible basis for competence to conclude international agreements may be found in ‘a legally binding Union act’, hence in the Directives, Regulations and Decisions referred to in Article 288(1) TFEU, and arguably also in other international agreements.

## 4.2 Concluding international agreements

Obviously, whenever the EU enters into an international agreement with a non-EU country or another international organisation, it does so on the basis of and subject to the relevant rules of international treaty law. As an international actor, the EU needs its Institutions (mainly the Commission and the Council) to negotiate and conclude international agreements with third states and other international organisations. Whereas the Vienna Convention uses the term ‘conclusion’ for the entire treaty-making process, which encompasses, *inter alia*, the phases of negotiation, initialling and signing, the EU Treaties clearly differentiate between the different phases. In the post-Lisbon Treaties the procedures are streamlined and a special role is foreseen for the EU High Representative for Foreign Affairs and Security Policy. While the procedures in principle apply to all Union areas, we will note that some special rules have been created for international agreements concluded in the area of CFSP.

### 4.2.1 Negotiating an international agreement

According to Article 218 TFEU, which lists the entire procedure, the process is very much in the hands of the Council (which ‘shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them’), although in practice it is above all the Commission that is the central actor in both the preparation and the negotiations themselves. It all starts with a recommendation to the Council from the Commission, or the High Representative. Apart from the situation where an agreement ‘relates exclusively or principally’ to the common foreign and security policy (CFSP) – in which case the High Representative is in charge of a recommendation – the Commission shall submit recommendations to the Council. History has shown that the question of whether an agreement ‘relates exclusively or principally’ to CFSP or CSDP may be difficult to an-

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<sup>65</sup> See also the Opinion of AG Tizzano, Case C-466/98 *Commission v. United Kingdom*, paras 46-59 (*Open Skies*).

swer.<sup>66</sup> On the basis of the (unpublished) recommendation by either the Commission or the High Representative, the Council adopts a decision which in turn forms the basis for the negotiations. Depending on the subject matter of the agreement this is done by qualified majority voting (QMV) or unanimity. The context suggests that the Commission will be appointed as the negotiator, unless we are dealing with a CFSP agreement, in which case the High Representative will be appointed negotiator. This would also be in line with the general role of the Commission in the Union's external representation (compare Art. 17 TEU). In case of a hybrid agreement which covers both CFSP and other matters, both the Commission and the High Representative may be part of the negotiating team. All of this reveals that the identification of the negotiator is largely settled by primary law. It has rightfully been observed that, post-Lisbon, 'the negotiator enjoys a significant margin of manoeuvre because it is a representative of the Union and does not act merely on behalf of the Council'.<sup>67</sup>

The negotiator acts within the framework of special directives issued by the Council and a special committee (composed of national governmental experts) allows the Council to control the process (Article 218(4)). Special procedures are foreseen for the Union's Common Commercial Policy (Article 207(3) TFEU).

In general, negotiations end by the initialling of the text. For the Union, this is done by the negotiator. Again, this nicely follows the international rules and is what the Vienna Convention refers to as 'the adoption of the text' (Art. 9) and implies that parties are ready to take the text back home for approval.

#### 4.2.2 Concluding an international agreement

The actual conclusion of an international agreement takes place in two stages on the basis of a decision by the Council: signature and conclusion. Although in practice it may not always be necessary to take these two steps, they follow the logic presented in the international law rules laid down in the Vienna Convention on the Law of Treaties. Even before a formal entry into force, signing the agreement already has legal consequences, in the sense that 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty' (Art. 18 Vienna Convention). Indeed, on the basis of international treaty law, signature is one way for a state or international organisation

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<sup>66</sup> Case 91/05, *Commission v. Council (ECOWAS or Small Arms and Light Weapons case)*. See Hillion and Wessel, *op.cit.*

<sup>67</sup> M. Gatti and P. Manzini, 'External Representation of the European Union In the Conclusion of International Agreements', *Common Market Law Review*, 2012, pp. 1703-1734 at 1711.

to express the necessary *consent to be bound*, albeit that failure to formally conclude/ratify the agreement (for instance because of domestic parliamentary objection) may form a reason for a state to ‘un-sign’ in order to get rid of its obligations under Article 18 of the Vienna Convention. Article 218(5) also refers to the possibility of provisional application (compare Article 25 Vienna Convention), which allows the parties to apply the treaty provisionally, pending the entry into force of the agreement. Considering the long period that is usually needed for the ratification of mixed agreements (see below), this may offer a way out.

Actual conclusion of the agreement has both an external and an internal dimension. *Externally*, it finalises the expression of the consent to be bound and the Union becomes a party to the agreement (the entry into force of which is dependent on what the parties agreed on). This is usually done by notifying the other parties or the depositary by way of an instrument of ratification (a letter in which the ratification is expressed). Prior to that, *internally*, a decision has to be taken upon a proposal by the negotiator (Article 218(5)). This decision is comparable to other decisions taken by the Council and lists the consideration leading to the decision, the legal basis as well as further procedural points.

Article 218(8) provides the voting rules and mentions qualified majority voting as the default procedure. Exceptions are issues which require unanimity for internal measures, association agreements (see below) and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Additional exceptions include CFSP/CSDP matters, or indirect taxation (Art. 113 TFEU), and certain trade agreements (Article 207(4) TFEU).

As we have seen, once concluded, international agreements form an integral part of the Union’s legal order and their substance and procedural content may directly affect EU citizens and companies. It should therefore not come as a surprise that the treaty drafters decided to extend the role the European Parliament enjoys under the regular legislative procedure to include the adoption of international agreements. Article 218(6) therefore calls for the consent of the European Parliament in some specific cases. In other cases the European Parliament shall be ‘consulted’ only.

Article 218 is quite clear about the fact that international agreements to which the European Union becomes a party are concluded by the Council. In the past, however, the Court agreed that in particular circumstances the Commis-

sion has a competence to conclude ‘international administrative agreements’. In such cases the Commission would not act on behalf of the EU (and thus the EU itself would not be a party).<sup>68</sup>

#### 4.2.3 Terminating or suspending an international agreement

The Treaty has a procedure for the termination of an international agreement. Article 218(9) TFEU provides the following:

The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

Obviously, this is an internal rule only and any suspension of an international agreement should be in accordance with international treaty law. This may also be the reason why currently suspension clauses are included in agreements with third states. Reasons for the EU to suspend an agreement may relate to human rights violations or war situations in third countries.<sup>69</sup>

Termination of international agreements should also be in line with international treaty law. The EU Treaties lack a specific procedure for the termination of treaties, but one could argue that for any modification or termination of an agreement the same procedure should be followed as for the conclusion of an agreement, unless the agreement itself settles the question in a different fashion.

### 4.3 Types of international agreements

As we have seen, international agreements may be concluded in all areas of EU activity. The reason is that, whenever the Union exercises more competences internally, there is simply no possibility to leave the external relations in the hands of the Member States only. The friction that is caused by this is most apparent in the case of mixed agreements. Apart from this important category of agreements, we will also look at a number of specific situations that are regulated by the use of international agreements.

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<sup>68</sup> Case C-327/91 *France v. Commission*.

<sup>69</sup> For a situation where a suspension clause was lacking see Case C-162/96 *Racke v. Hauptzollamt Mainz*.

#### 4.3.1 Mixed agreements

The notion of ‘mixity’ follows from the fact that in many cases both the EU and the Member States are competent to engage in external action, or that international agreements cover a variety of areas, all of which are subject to different divisions of competence. As we have seen the Lisbon Treaty strengthened the separate international legal position of the Union in relation to its Member States. Yet, only in very few cases would the EU be exclusively competent to conclude an agreement, which implies that in most cases the Member States will have to become a party as well. While for political reasons this allows Member States to remain present and visible themselves on the international stage, the need to have a mixed agreements obviously complicates as well as prolongs the process of concluding international agreements. Mixed agreements can be both bilateral (between the EU/MS and a third state or international organisation)<sup>70</sup> and multilateral (between the EU/MS and a number of other states).

While for the EU the general procedure in Article 218 TFEU continues to apply, a number of issues render the conclusion of mixed agreements special. After all, at all stages of the process, account will have to be taken of the possibly different positions of the EU and its 28 Member States. It is essential for the EU and its Member States to speak with one voice during the negotiations, also not to allow the third party to abuse a possible difference of opinion. The European Union (read: European Commission) therefore has a strong preference to act as the sole negotiator, and to so on behalf of the Member States also, but it depends on the sensitivity of the topic to which extent Member States will actually allow the Commission to act as their representative. In any case, it is important to agree on a common position, but as negotiations by definition require some flexibility on both sides, any negotiator would need a certain freedom to change its position.

The complexity is strengthened by the fact that it is virtually impossible to clearly distinguish between the areas falling under (exclusive) EU competence and areas in which the Member States still have a (perhaps large) role to play. Many agreements are a clear mix of issues, which calls for the need to accept a certain fuzziness both on the side of the EU and on the side of the Member States. A strict division of competence would call for separate roles for the EU and the Member States during the process, but obviously this could seriously harm the negotiating position and would make it very unattractive for third states to enter into negotiations on mixed agreement. Indeed,

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<sup>70</sup> M. Maresceau, ‘A Typology of Mixed Bilateral Agreements’, in C. Hillion and P. Koutrakos, *Mixed Agreements Revisited*, Oxford: Hart Publishing, 2010, pp. 11-29.

one should bear in mind that for third states it is often far from clear where the competence lies; they rather deal with one (combined) party.

A clarification of the division of competences is nevertheless possible and may take the form of a 'declaration of competence',<sup>71</sup> which lays down the respective competences of the EU and its Member States in the different fields addressed by the agreement. The problem with these declarations is that the division of competences is dynamic: what can be a reasonable description for the division at the time of the conclusion of an agreement may very well change over the years. And, although from an internal point of view the exact delimitation of competences is not required (as confirmed by the Court in *Ruling 1/78*<sup>72</sup>), third states may demand it, also to have some clue whom to address in cases of conflicts on the interpretation or implementation.

Because of the fact that they become full parties, Member States need to sign and conclude mixed agreements as well. This implies that a ratification procedure is necessary in each Member State. Although swift ratification is possible even in very complex cases (as the case of the WTO agreement showed), the fact that each and every Member State may delay the process because of complex parliamentary or federal reasons usually creates a time-consuming process.<sup>73</sup> While in certain cases provisional application may be possible, practice reveals that the Council will await ratification by all Member States before concluding the agreement on behalf of the EU.<sup>74</sup> In case the process takes too much time, the Council can propose an interim agreement, to which the Member States are not parties, but which would at least allow the EU and the third party to proceed with their cooperation in an area within the competence of the EU.

Obviously, once they become parties, Member States are bound by the agreement. The current Treaty provides the rule that 'Agreements concluded by the Union are binding upon the institutions of the Union *and on its Member*

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<sup>71</sup> See more extensively P.M. Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner', in: C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford: Hart Publishing, 2010, pp. 331-348.

<sup>72</sup> *Ruling 1/78 re Convention on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978]. This judgment was delivered in the framework of the EAEC.

<sup>73</sup> See A. Rosas, 'The European Union and Mixed Agreements', in A. Dashwood and C. Hillion (Eds.), *The General Law of EC External Relations*, London: Sweet & Maxwell, 2000, at 208; and J. Czuczai, 'Mixity in Practice: Some Problems and Their (Real or Possible) Solution', in Hillion and Koutrakos, *op.cit.*, pp. 241-245.

<sup>74</sup> See also F. Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States', in Hillion and Koutrakos, *op.cit.*, pp. 249-268 at 256.



States' (Art. 216(2) TFEU). Given the fact that mixed agreements are also to be considered an 'integral part of EU law',<sup>75</sup> the question may arise why we have mixed agreements at all. The answer lies in the fact that the EU is simply not competent to claim all areas of Union law exclusively; the Treaties foresee a division of competences which is also to be reflected in the external relations. Indeed, in both case the Member States are bound by the agreements. The difference is that in the case of agreements concluded by the EU they are bound on the basis of EU law as they do not have a direct legal relationship with the third party; and in the case of mixed agreements Member States are bound on the basis of international treaty law, and at the same time will have to abide by the relevant rule of EU law (for instance in relation to the duty of cooperation; see below). In some cases not all Member States become party to a mixed agreement ('partial mixity'). When we follow the above rules, this would imply that those Member States that have not themselves become a party are not bound on the basis of international law, but they are still bound on the basis of EU law (Art. 216(2)).

In areas of shared competence, the 'duty of cooperation' is to guide the actions of both the Union and its Member States. This 'duty' flows from the 'principle of sincere cooperation' as laid down in Article 4(3) TEU:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Whereas the 'duty' is thus a general principle, applicable to all EU and Member State activity, it has a special importance in the area of the external relations. Since the Treaties are often unclear about the exact division of competences, the Court has frequently used the duty of cooperation as a guideline to establish the EU's competences and/or the Member States' obligations in external relations law.<sup>76</sup>

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<sup>75</sup> Case C-431/05 *Merck*.

<sup>76</sup> See C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation', in Hillion and Koutrakos, *op.cit.*, pp. 87-115.

Ruling 1/78 (see above) is generally seen as the ‘mother of all judgments on the duty of cooperation’. Indeed, in this judgment the CJEU used and further interpreted the duty of cooperation, which is phrased in Article 192 of the European Atomic Energy Community (EAEC) Treaty in similar terms as in Article 4(3) TEU. As in many subsequent cases, the situation related to (collective) Member State action, which negatively affected independent external action by the Community. Thus, the duty of cooperation proved to be a key principle in relation to shared external competences.

More recent case law in very different areas (ranging from *Mox Plant*<sup>77</sup> to *Kadi*) has made clear the implications of the stronger international presence of the EU, in particular in relation to the existing external competences of the Member States. In *PFOS*, the question was raised to what extent Member States are constrained in their actions under international law by the fact that they are not only states, but also (or perhaps above all) Member States of the EU.<sup>78</sup> In this case, Sweden unilaterally nominated a substance (PFOS; *per-fluorooctane sulfonates*) for listing under the Stockholm Convention on Persistent Organic Pollutants (POPs), a mixed agreement. Obviously, this question was not new and lies at the heart of almost all struggles in EU external relations law, but in this case no inter-institutional agreement was concluded and no formal EU decisions were taken which would *prima facie* restrain Member States from exercising their own competences under international treaty law as we know from previous case law.<sup>79</sup> One could argue that, by restricting the autonomous position of Sweden, the duty of cooperation was stretched a bit further.<sup>80</sup> At the same time the case pointed clearly to the limits of ‘procedural and substantive obligations of the Member States as loyal members of the Union when acting as contracting parties in their own right’ when we do not want to undermine the very existence of separate competences of the

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<sup>77</sup> Case 459/03 *Commission v. Ireland* (Mox Plant).

<sup>78</sup> See also the case note by M. Cremona, *Common Market Law Review*, 2011, pp. 1639-1666.

<sup>79</sup> Including Opinion 1/91; Opinion 1/94; Case 53/96, *Hermes International v. FHT Marketing*; Joined Cases C-300 & 392/98, *Parfums Christian Dior SA*; Case C-431/05, *Merck Genéricos v. Merck & Co. Inc and Merck Sharp & Dohme Ltd*. Case 459/03, *Commission v. Ireland* (‘Mox Plant’); and Case 25/94, *Commission v. Council* (‘FAO’).

<sup>80</sup> On the many dimensions of the duty of cooperation see Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation’, *op.cit.*; E. Neframi, ‘The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations’, *Common Market Law Review*, 2010, pp. 323-359; M. Cremona, ‘Defending the Community Interest: The Duties of Cooperation and Compliance’, in M. Cremona and B. De Witte (Eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford: Hart Publishing, pp. 125-170.

Member States.<sup>81</sup> Mixity is the logical consequence of the existence of a shared competence, but cases such as *PFOS* underline that Member States cannot act on their own and have to take into account existing or planned EU action. In this case Sweden could not act unilaterally as that would dissociate it from a concerted common strategy within the Council and would deviate from a position submitted by the Commission.

In a way, the *PFOS* case built upon two other cases, in which the Commission claimed that Luxembourg and Germany violated the principle of sincere co-operation by continuing negotiations and even ratifications of bilateral agreements with a number of Central and Eastern European countries on transport by inland waterways, while the Commission had already been given a mandate to negotiate a multilateral agreement.<sup>82</sup> The outcome of the case was a clear statement, paraphrased by Eeckhout as: ‘unilateral treaty making action by a Member State coinciding with EU negotiation cannot be tolerated, unless that Member State consults and cooperates with the EU, and in particular with the Commission’.<sup>83</sup> As we see below, this reasoning may also have consequences for existing agreements concluded by the Member States.

These judgments did not come out of the blue and were in fact based on a line of argumentation that was gradually developed ever since Ruling 1/78. In Opinion 2/91 (ILO) the Court pointed to the need for the Union (then Community) and the Member States to cooperate. Whereas the subject matter partly falls within EU competence, the Union itself cannot become a party to the ILO Conventions. In this case, which concerned a shared competence that could not be exercised by the Union externally, Member States have to act on behalf of the Union. The Court also explicitly referred to the need for the Community and the Member States to act in harmony in their external legal relations. Whereas in the case of the ILO we were dealing with a shared competence, but not with mixed agreements, Opinion 1/94 (WTO) drew attention to an actual mixed agreement (the WTO Agreement) and more particularly to the substantive trade agreements annexed to the WTO Agreement. It countered the Commission’s worries that the Member States would probably not be able to resist taking individual positions which would harm the required

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<sup>81</sup> M. Cremona, *PFOS* Case Note, *op.cit.*, p. 1665; A. Thies, ‘Shared Competence and the EU Member States’ Obligations to Refrain from Unilateral Action: *PFOS* and Beyond’, in J. Díez-Hochleitner, C. Martínez Capdevila, I. Blázquez Navarro, and J. Frutos Miranda (Eds.), *Últimas tendencias en la jurisprudencia del Tribunal de Justicia de la Unión Europea* (Recent trends in the case law of the Court of Justice of the European Union), Madrid: La Ley-Grupo Wolters Kluwer, 2012, pp. 703-728.

<sup>82</sup> Cases C-519/03 *Commission v. Luxembourg* and C-433/03 *Commission v. Germany*.

<sup>83</sup> Eeckhout, *op.cit.* at 248.

unity. The duty of cooperation would also apply in this case and should also ensure that – for instance in dispute settlement situations – Member States would not take different positions (in fact, in practice the EU and its Member States do act in a unitary fashion in WTO dispute settlement). Finally, in *Commission v. Council*,<sup>84</sup> the Court dealt with an unclear division of competence in relation to an agreement to promote compliance with international conservation and management measures by vessels on the high seas, which was to be concluded in the framework of the FAO (an organisation of which both the EU and the Member States are members). This case also revealed that the Institutions themselves may take different positions. Here the Commission claimed an exclusive competence because of the subject matter (fisheries), the Council (not surprisingly) supported the Member State's view that they would still have individual rights and competences. The Court finally agreed that the main thrust of the agreement lay in the area of exclusive competence, but that the duty of cooperation was relevant for the areas of shared competence, which also reflected the institutional 'arrangement' that existed between the Commission and the Council. In fact, the duty of cooperation was reflected in that arrangement (section 2.3) and by allowing the Member States to act on their own the Council had violated that principle.

The developments reveal the extensive role of case law in determining the scope of EU and Member States' external competences. The Lisbon Treaty itself shows that changes in primary law also directly influence that scope. Thus, for instance, the 'commercial aspects of intellectual property' have been brought under the heading of the EU's Common Commercial Policy (CCP, Article 207(1) TFEU). When confronted with a question raised by a Greek court on whether the Member States are still competent to act in the area concerned by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the CJEU answered that this area now falls under the CCP and that given the exclusive competence of the EU in that area (Article 3(1)(e) TFEU) the question on the delimitation of competences has become irrelevant.<sup>85</sup> After all, we only have to worry about this issue in relation to a *shared* competence. This forms a good example of a clear change in primary law in the Lisbon Treaty with a direct effect on the division of external competences between the EU and its Member States. We will see a similar effect in relation to the changing nature of the competence in relation to international investments below.

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<sup>84</sup> Case C-25/94 *Commission v. Council*.

<sup>85</sup> Case C-414/11 *Daiichi Sankyo Co. Ltd*, 18 July 2013.

One particular situation concerns the representation by the Commission even for parts of areas where the Union has no competence. The need for unity in representation calls for the Commission to act upon a mandate by the Member States. Obviously, in such cases the Commission's mandate cannot be derived from the Treaty or from a Council Decision. Hence, a special 'Decision of the representatives of the governments of the Member States, meeting within the Council' is adopted, through which the representatives of Member States 'authorize the Commission to negotiate, on behalf of Member States' for the elements of the agreement that fall within the competences of the Member States. The need for a separate document also flows from the fact that a Council decision is normally adopted by qualified majority, whereas that of Member States is taken by unanimity.

The developments in relation to 'mixity' will have consequences for the relationship between international law and EU law as Member States' international competences may be further restrained on the basis not only of ongoing but also of future EU action. One may regard this as a logical consequence of the (external) coming of age of the EU. Yet, new questions arise: 1. Internally: how far can the principle of sincere cooperation be stretched without turning existing shared competences into a mere theoretical notion? 2. Externally: to what extent is international law well enough developed to allow the EU to take over state-like functions? (E.g. in relation to the law of treaties, diplomatic law and the law on international responsibility – see section 6 below.)

#### 4.3.2 Association, accession and withdrawal

A number of international agreements are often considered to have more of a European law nature than to be part of international law. This is particularly true for association agreements (through which a special relationship with the EU is established) and agreements related to the accession to or withdrawal from the EU. Yet, even in these cases one should remain aware of the fact that the agreements are (also) subject to the general rules of international law.

The competence of the EU to conclude association agreements is to be found in Article 217 TFEU:

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Although the notion of ‘association’ is not defined by the Treaties (apart from the fact that it would (obviously) involve ‘reciprocal rights and obligations, common action and special procedure’), practice has revealed that association agreements are indeed a special type of agreement, used to establish a far-reaching relationship with a third country. Association agreements are characterised by a number of specific features:

- The legal basis for their conclusion is Article 217 TFEU;
- There is an intention to establish close economic and political cooperation;
- So called ‘paritary bodies’ for the management of the cooperation are created, which are competent to take decisions that bind the contracting parties;
- A Most Favoured Nation treatment is included;
- A privileged relationship between the EU and its partner is provided for (in the words of the Court: ‘a special, privileged link’<sup>86</sup>);
- A clause on respect for human rights and democratic principles is systematically included and constitutes an essential element of the agreement.

Association agreements (albeit not always under that name) currently exist with Turkey (1963), Iceland, Norway, and Liechtenstein (1993), FYRoM (2001), Albania (2006), Montenegro (2007), Bosnia and Herzegovina (2008), Tunisia (1995), Israel (1995), Morocco (1996), Palestinian authority (1997 Interim), Jordan (1997), Egypt (2001), Algeria (2002), Libya (2002), Chile (2002) and the countries in the former colonies in Asia, the Caribbean and the Pacific (‘ACP countries’) (2000/2005).

The different associations have led to a complex web of relations between the EU, its Member States and a number of third countries. As one observer held, the different forms of ‘enhanced multilateralism and bilateralism’ thus lead to ‘integration without membership’ and an ‘EU legal space’.<sup>87</sup>

Association agreements have often been used as a first step towards accession and, indeed, many of the current EU Member States first enjoyed associate status.<sup>88</sup> In other cases, association agreements are the follow-ups of so called cooperation agreements, which may be concluded on the basis of

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<sup>86</sup> Case 12/86 *Demirel v. Stadt Schwabusch Gmünd*.

<sup>87</sup> A. Lazowski, ‘Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union’, *Common Market Law Review*, 2008, pp. 1433-1458.

<sup>88</sup> See for instance M. Maresceau and E. Montaguti, ‘The Relations between the European Union and Eastern Europe: A Legal Appraisal’, *Common Market Law Review*, 1995, pp. 1327-1367.

Article 212 TFEU. Associations are far-reaching and may extend key internal market principles to third countries, as has been recognised also by the Court (see below).

Nevertheless, association agreements differ, even procedurally, from accession agreements. On the basis of Article 49 TEU, ‘The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement [...]’. But, although the European Union (and in particular the Commission) is the key negotiator, the final agreement is concluded ‘between the Member States and the applicant State’ and, ‘[it] shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements’. Accession agreements are thus not concluded by the EU.

A similar situation would occur in the event of withdrawal of a Member State. The Lisbon Treaty brought an innovation in this respect and for the first time this situation has been regulated in a treaty provision. Article 50 TEU calls upon the Union to negotiate and conclude ‘an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. Yet, in this case a reference is made to Article 218(3) TFEU for the negotiation stage and the agreement ‘shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament’. It is interesting to note that to join the Union a legal relationship with the current Member States needs to be established, but to leave the Union a state will have to settle the issue with the organisation of which it has become a member.<sup>89</sup>

#### 4.3.3 Accession to international organisations

The Union may also become a member of other international organisations once a competence on the side of the EU can be established and the other organisation is (in statutory terms as well as politically) willing to welcome the EU as a member. Membership of international organisations typically implies joining the constituent treaty of the organisation which may include the need to become party to an accession treaty.

In Opinion 1/76, in relation to whether an agreement ‘establishing a European laying-up fund for inland waterway vessels’ is compatible with the provisions of the Treaty, the Court argued:

the Community is [...] not only entitled to enter into contractual relations with a third country in this connexion but also has the power,

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<sup>89</sup> A. Lazowski, ‘Withdrawal from the European Union and Alternatives to Membership’, *European Law Journal*, 2012, pp. 523-540.

while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism such as the public international institution which it is proposed to establish under the name of the 'European laying-up fund for inland waterway vessels'.<sup>90</sup>

In subsequent situations, such as the establishment and joining of the EU (at the time the EC) of the WTO,<sup>91</sup> the Court underlined this view. The current Treaties do not provide for a specific procedure for agreements to establish or join international organisations, which implies that the general rules of Article 28 TFEU apply.

#### 4.3.4 (The future of) international agreements concluded by the Member States only

Obviously, the competence of the EU to conclude international agreements and the possibility of concluding mixed agreements does not deprive the Member States of their individual competence to conclude treaties under international law. They remain international actors on their own account. Over the years, however, the extensions of the competences of the EU and its external activities have called for a careful assessment of the extent to which the agreements concluded by the Member States may be in conflict with EU law.<sup>92</sup>

As far as international agreements concluded prior to the establishment of the European Economic Community are concerned, the matter is regulated by Article 351 TFEU, which basically states that these agreements shall not be affected, but incompatibilities with EU law should be removed. This again reveals an uneasy relationship between international treaty law and the supremacy of EU law. After all, in case of conflicts between provisions in an international agreement and EU law, Member States may be obliged to give priority to EU law based on the general rules on supremacy, but whenever these arguments are not accepted by a third party (which is not required, on the basis of the *pacta tertiis nec nocent nec prosunt* rule – see above), they have every right to ask for a correct implementation of the agreement. From the EU side, the pressure on Member States at least to find an interpretation that would allow for EU law to work properly may be intense. In recent case law, the Court held that international agreements 'may in no circumstances permit any challenge to the principles that form part of the very foundations

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<sup>90</sup> *Opinion 1/76 re draft Agreement establishing a European laying-up fund for inland waterway vessels*, para 5.

<sup>91</sup> *Opinion 1/94 re WTO Agreement*.

<sup>92</sup> See (much) more extensively: J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009.



of the [EU] legal order',<sup>93</sup> and indeed, Article 351 is generally believed not to create an unlimited reason for Member States to evade EU law.<sup>94</sup>

Apart from pre-existing agreements with third states, international agreements among the Member States (so-called agreements *inter se*) may also potentially challenge the principles and foundation of the EU legal order. After all, they run the risk of allowing Member States to by-pass EU law. These agreements are not covered by Article 351.<sup>95</sup> Yet, ever since *ERTA*<sup>96</sup> it is clear that Member States cannot freely choose the international or the EU route whenever the subject is covered by EU law, which implies that agreements *inter se* should be limited to topics that are not (at all) covered by the EU Treaties.

Considering the extensive legal relations Member States maintain with third states, the potential for conflict is real and is not solved by the current treaty regime. How to prevent conflicts with EU law? Several options have been developed in practice. 1. *Ex ante*: for new agreements the best solution seems to be to prevent Member States from negotiating and concluding agreements in areas which fall under EU competence. In case of an exclusive competence it is clear that the Member States are simply no longer allowed to conclude the agreement, in case of a shared or a parallel competence the case law indicated that it would be strongly recommended to cooperate with the Commission in order to prevent conflicts with (planned) EU activities. As early as 1976, in *Kramer*<sup>97</sup> the Court held that Member States are 'not to enter into any commitment within the framework of these [fisheries] conventions which could hinder the Community in carrying out the tasks entrusted to it'. 2. *Ex post*: the principle of supremacy implies that agreements concluded by the Member States are seen as national legislation. In contrast to agreements concluded by the EU, they do not rank above, but below secondary law. This means that they will simply have to be implemented in accordance with EU law and that Member States have an obligation to renegotiate possible conflicting provisions with the respective third parties.

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<sup>93</sup> Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para 304.

<sup>94</sup> F. Casolari, 'The Principle of Loyal Co-operation: A "Master Key" for EU External Representation?', in S. Blockmans and R.A. Wessel (Eds.), *Principles and Practices of EU External Representation*, The Hague: CLEER Working Papers, No. 5, 2012 pp. 11-35, at 27.

<sup>95</sup> Case C-812/79, *Attorney General v. Juan C. Burgoa*.

<sup>96</sup> Case 22/70.

<sup>97</sup> Case 6/76.

That this may have serious consequences for a large number of existing international agreements is exemplified by the so-called BITs (Bilateral Investment Treaties) cases.<sup>98</sup> The EU's presence in the field of foreign investment not only forms an example of the new international ambitions expressed by the Lisbon Treaty, but ironically also triggered the traditional reflex: an acceptance of the authority of international law, but at the same time a preservation of the autonomy of EU law. Although the cases differ from the above mentioned *PFOS* case, they seem to reflect a similar trend: exclusivity by stealth.<sup>99</sup> The outcome of the BITs cases is that all (over 1000) BITs will have to be renegotiated in order to prevent incompatibilities with EU law. As indicated by Dimopoulos, the long-term objective of the EU is to replace Member State BITs with EU Investment Agreements. In the meantime an authorisation system should combine the validity of the BITs that were concluded on the basis of international treaty law with the primacy of EU law.<sup>100</sup>

It is indeed the need for primacy of EU law that undermines existing competences Member States enjoy both under EU law and under international law. Where, traditionally, Member States are not *a priori* pre-empted from rule-making in an area of shared competence, the BITs cases reveal a number of Member States obligations even when the EU itself has not legislated. The reason for this is the 'hypothetical incompatibility' of existing international agreements with EU law.<sup>101</sup> The Court argued that even a perceived – but not yet materialised – conflict between the international agreements and EU law would lead to a violation of the capital movement provisions in Article 351 TFEU (then Art. 307 EC). The incompatibilities could jeopardise the future exercise of EU competences. In that sense, the judgments indeed continue 'the trend set by the ECJ in its *Mox Plant* and *Kadi* judgments by first decoupling the international law obligations from the EU law obligations and subsequently subordinating the former from the latter.'<sup>102</sup> As in earlier case law, in the BITs cases the Court does not simply deny the relevance of international law, but it claims that it cannot be used in this case. Indeed, the fact that the EU has powers

<sup>98</sup> Case C-205/06, *Commission v. Austria*; Case C-249/06, *Commission v. Sweden*; Case C-118/07, *Commission v. Finland*.

<sup>99</sup> R.A. Wessel, 'Integration by Stealth: On the Exclusivity of Community Competence', in D. Obradovic and N. Lavranos (Eds.), *Interface between EU Law and National Law*, Groningen: Europa Law Publishing, 2007, pp. 43-52.

<sup>100</sup> A. Dimopoulos, 'The BITs Cases and their Practical and Doctrinal Implications', in Díez-Hochleitner, Martínez Capdevila, Blázquez Navarro, and Frutos Miranda, *op.cit.*, pp. 737-758.

<sup>101</sup> N. Lavranos, Case Note, Cases C-205/06 and C-249/06, *American Journal of International Law*, 2009.

<sup>102</sup> *Ibid.*

on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveals the incompatibility with that agreement where, first the agreements does not contain a provision allowing the member State concerned to exercise its rights and to fulfil its obligations as a member of the [EU] and, second, there is also no international law mechanism which makes that possible.<sup>103</sup>

This is indeed the complex conflict we face. By arguing that international law itself does not offer solutions, the Court has no choice but to preserve the autonomy of EU law by limiting Member States' traditional treaty-making competences under international law, and by doing so it also hinders the exercise of shared competences and thus also reinterprets primary EU law. Yet, it has been argued that a narrow reading of the judgments would render the outcome of the cases more comprehensible.<sup>104</sup> In that interpretation Member States' international agreements are incompatible with EU law only when they preclude the future exercise of EU competence, so that *any* measure taken by the EU under a relevant power-conferring provision conflicts with the Member States' obligations. While there are certainly reasons to opt for this interpretation, the language used by the Court is more worrisome and could also be read as a hostile take-over by the EU of both Member states competences and international (treaty) law. After all, it is not at all clear that the BITs would in fact be incompatible with EU law, as long as EU competences have not been exercised. In these cases the Member States argue that an incompatibility could only exist after the EU had actually adopted the measures. Moreover, in case of an actual conflict, international treaty law offers mechanisms to deal with this situation (such as suspension, renegotiation, or ultimately denouncement of the agreements, in line with the *rebus sic stantibus* doctrine whereby a fundamental change in circumstances is a legitimate reason to suspend an international agreement). The question indeed is whether a hypothetical conflict could be seen as an incompatibility, in particular taking into account the consequences Member States enjoy in an area of shared competence.

A particular ironic situation occurs in areas when the EU enjoys an exclusive competence, but lacks the possibility to use it, because it is not a party to a particular agreement or cannot be a member of an international organisation. For several reasons Member States may thus participate in international agreements falling (at least partly) within exclusive Union competence. Re-

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<sup>103</sup> Paras 37 and 31.

<sup>104</sup> Dimopoulos, *op.cit.*

cent case law of the CJEU illustrates the possibly complex situation. *Intertanko* was about a request for a preliminary ruling on the compatibility between a Directive on ship-source pollution and the Marpol Convention. The Court argued that the Convention fell outside its jurisdiction as there was no transfer of powers:

It is true that all the Member States are parties to Marpol 73/78. Nevertheless, in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those states are parties to Marpol 73/78, be bound by the rules set out therein, which it has not itself approved.<sup>105</sup>

The content of such agreements can become part of EU law through secondary legislation. Through ‘good faith’ and the principles of sincere cooperation, conventions such as Marpol gain an interpretative function within EU law.

*Open Skies* deals with a situation where the EU has exclusively competence, but a large number of bilateral treaties exist. The solution offered by the Court was to try to remove inconsistencies, and accept a transition period until the EU can fully take over. Given the nature of the competence, Member State authorisation is required for amendments or renewal.<sup>106</sup>

These situations illustrate the need for the Union occasionally to accept a role by the Member States even in areas of its exclusive competence.<sup>107</sup>

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<sup>105</sup> Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*.

<sup>106</sup> See the *Open Skies* cases referred to above.

<sup>107</sup> M. Cremona, ‘Member States Agreements as Union Law’, in Cannizzaro, Palchetti and Wessel, *op.cit.*, pp. 291-324.

## 5 The effects of international law within the EU legal order

### 5.1 Internal effects of international law and external effects of EU law

So far we have established that the EU is bound by international law. The current section looks at the consequences of this assertion, in particular within the EU legal order. In other words, we look at the internal effects of international law. Again, it seems fair to conclude that traditionally not so much was regulated by the Treaties and that the Lisbon Treaty did not change this situation. Hence, we look at recent case law, and by way of an introduction to one particular case in which the Court not only nicely summarised some of the relevant issues, but also addressed the question of whether non-EU states can be bound by EU legislation.

In December 2010 the CJEU ruled in a case concerning the applicability of rules of written and unwritten international law in relation to a Directive to include aviation activities in the scheme for trading greenhouse-gas emission allowances within the Union.<sup>108</sup> This directive does not only affect EU Member States, but in fact all aircraft operators when their aircraft are in the territory of one of the Member States and, more specifically, at an airport situated therein. Obviously, third states are not too eager to pay for greenhouse-gas emissions for those miles they do not fly in EU airspace.

On 16 December 2009, the American Air Transport Association and others brought judicial review proceedings asking the referring court to quash the measures implementing the directive in the United Kingdom.<sup>109</sup> In support of their action, they pleaded that that directive was unlawful in the light of international treaty law and customary international law. In its ruling, the CJEU nicely summarised the main principles related to the effect of international law in the EU legal order.

First of all, the Court confirmed that the EU is in principle bound by international law. This has indeed been standard case law ever since the

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<sup>108</sup> Directive 2008/101/EC to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

<sup>109</sup> Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*.

International Fruit Company case in 1972.<sup>110</sup> Second, the Court can examine the validity of an act of EU law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this.<sup>111</sup> Finally, where the nature and the broad logic of the treaty in question permit the validity of the act of EU law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of EU law appear, as regards their content, to be unconditional and sufficiently precise.<sup>112</sup>

Yet, the question is of course different when the EU is not a party to a particular international agreement. In that case, in order for the EU to be capable of being bound, it must have assumed, and thus had transferred to it, all the powers previously exercised by the Member States that fall within the international agreement in question. In this case, however, the question related to the Chicago Convention and the Court held that in that case the powers previously exercised by the Member States had not been assumed in their entirety by the EU, the latter is not bound by that convention. In other words: the EU was not bound because it was not itself a party to the agreement and it had not replaced the Member States. This led to the conclusion that the provisions of the Chicago Convention cannot be said to form part of the EU legal order.

But what if the EU *is* a party to an international agreement? In the same American Air Transport Association case the CJEU answered this question as follows. Here it concerned the Kyoto Protocol, an international agreement on CO<sub>2</sub> emissions. Since the EU is a party, the provisions of the Kyoto Protocol form an integral part of the legal order of the EU as from its entry into force.<sup>113</sup> A similar reasoning was followed in relation to the Open Skies Agreement, to which the EU is also a party. And, since the agreement

establishes certain rules designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms which are capable of being relied upon against the parties to that agreement, and the nature and the broad logic of the agreement do not so preclude, the conclusion can be drawn that the Court may assess the validity of

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<sup>110</sup> Joined cases 21 to 24/72 *International Fruit Company NV v. Produktschap voor Groenten en Fruit*.

<sup>111</sup> See also Joined Cases C-120/06 P and C-121/06 P, *FIAMM and Others v. Council and Commission*, para 110.

<sup>112</sup> Case C-344/04, *Queen on the application of International Air Transport Association v. Department for Transport (IATA and ELFAA)*, para 39, and *Intertanko (op.cit.)*, para 45.

<sup>113</sup> See also Case 181/73 *Haegeman*, para 5.

an act of European Union law [...] in the light of the provisions of the agreement. (para 84).

Hence, in order to know whether international agreements can play a role within the EU (primarily to set aside internal EU legislation) the EU will have to be bound by the agreement and the agreement must allow for it to be directly applicable to individuals or companies. We will come back to this later, but at this point it is important to underline that international law is not only seen as an integral part of the Union's legal order, but that it can also set aside internal EU legislation.

But what about unwritten international law, usually referred to as 'customary law'? The Court referred to Article 3(5) TEU introduced by the Lisbon Treaty (see above), on the basis of which the EU is to contribute to the strict observance and the development of international law. The Court argued that this implies that the Union is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the EU.<sup>114</sup> However, since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review is necessarily limited to the question whether, in adopting internal legislation, the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles. In other words: because customary law is often less precise, it is more difficult to apply it in detail.

The main question the American airline companies were interested in, however, was whether they could be subjected to rules based on treaties (the EU Treaties) to which they were not a party. The Court held that EU legislation applies in the territory of the EU Member States and may thus be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, at an airport situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the EU.<sup>115</sup> It follows that the EU has competence to apply its internal rules to external parties once they enter 'EU territory' and, since the emission rules in the Kyoto Protocol concern complete flights, the EU Directive could be applied to all flights which arrive at or depart from an airport situated in the territory of a Member State, even when for the most part they would not fly over EU territory.

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<sup>114</sup> See, to this effect, Case C-286/90 *Poulsen and Diva Navigation*, paras 9 and 10; and Case C-162/96 *Racke*, paras 45 and 46.

<sup>115</sup> See, by analogy, *Poulsen and Diva Navigation*, para 28.

International law is thus not only applicable in the EU, but international actors may also be subject to EU law.

## 5.2 Direct applicability of international agreements

As far as international agreements are concerned, we have seen that the *Haegeman* doctrine that international law forms an integral part of EU law implies what is, post-Lisbon, laid down in Article 216(2) TFEU ('Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'). This means that there is no specific need to transpose international agreements to EU law or to the domestic law of the Member States (for instance by means of a special Regulation).<sup>116</sup> Indeed, at first sight this would reflect a perfect 'monist' situation. In practice, however, the CJEU's case law is not that uniform and reveals a need to take the nature of the agreement into consideration whenever the question of its 'direct effect' comes up.

Where 'direct applicability' refers to the validity of international norms without having to be transposed into European law, 'direct effect' relates to the question of whether these norms can actually be invoked by individuals before a domestic or EU court (see also above). As we have seen, the basic rule is that this is the case. In the case of *Bresciani*,<sup>117</sup> the CJEU established that Community [now: Union] association agreements could be used in national courts to challenge national law. In the landmark case *Kupferberg*,<sup>118</sup> it confirmed the direct effect of an 'ordinary' bilateral trade agreement (not an accession agreement). In *Sevince*, the Court found that decisions adopted by an Association Council and created by an association agreement were capable of having direct effect, provided they fulfil the same criteria that determine whether an international agreement has direct effect.<sup>119</sup> Similarly, it was confirmed that third-country nationals could rely on the provisions of agreements concluded with the European Union. Thus, the Russian football player Igor

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<sup>116</sup> F.G. Jacobs, 'Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice', in A. Dashwood and M. Maresceau (Eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, pp. 13-33.

<sup>117</sup> Case 87/75 *Conceria Daniele Bresciani v. Amministrazione delle finanze dello Stato*; see also: Case C-18/90 *Office national de l'emploi v. Kziber* (Association Agreement between the Community and Morocco) and Case C-268/99 *Jany and Others v. Staatssecretaris van Justitie* (Provisions of the Association Agreement between the Community and Poland and the Community and the Czech Republic have direct effect notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment).

<sup>118</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg & Cie.*

<sup>119</sup> Case C-192/89 *Sevince v. Staatssecretaris van Justitie.*



Simutenkov, at the time employed by the Spanish club Deportivo Tenerife, could invoke relevant provisions of the Partnership and Cooperation Agreement (PCA) with Russia. Article 23(1) of that PCA provided the following: ‘Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.’ In examining this provision, the CJEU found that they lay down ‘in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating on grounds of nationality, against Russian workers vis-à-vis their own nationals’.<sup>120</sup>

Ten years after *Haegeman*, the Court was less clear in applying its doctrine. Starting with *Kupferberg* (Case 104/81) the Court put the pure monist starting point into perspective, when it argued that ‘the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question.’<sup>121</sup> This idea was elaborated in further case law, starting with *Demirel*.<sup>122</sup>

14. A provision in an Agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the Agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

Indeed, this implies that the original monistic starting points (international law as an integral part of EU law) do not automatically entail direct applicability of all international agreements concluded by the Union.

Reasons for the CJEU to limit the domestic effects of international agreements vary. A classic argument is *reciprocity*: third states also limit the direct effect of the same agreement. This argument prevailed in, for instance, *Kupferberg*, and returned in *Van Parys*: ‘[...] having regard to their nature and

<sup>120</sup> Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*. See more extensively: C. Hillion, ‘Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*’, [2005] ECR I-2579, *Common Market Law Review*, 2008, pp. 815-833.

<sup>121</sup> See also Cannizzaro, *op.cit.*, at pp. 37-39.

<sup>122</sup> Case 12/86 *Demirel v Stadt Schwäbisch Gmünd*.

structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.<sup>123</sup>

The nature of WTO law thus prevents the Court from giving effect to these norms within the EU legal order. This may be referred to as a dualist exception in a mostly monist system, but is it really? There is perhaps no doubt that the norms of WTO agreements are valid within the EU legal order; the problem lies more in the possibilities to *apply* them in case of a conflict.

While WTO law had long been the odd one out, more recently the CJEU seems to have extended the idea to the Law of the Sea. Here, however, it was not so much reciprocity that triggered the Court to be careful with the domestic application of an international agreement, but rather the *effects on individual rights*.<sup>124</sup> Earlier the Court had established that 'when an agreement established cooperation between the parties, some of the provisions of that agreement may [...] directly govern the legal position of individuals'.<sup>125</sup> Now, in *Intertanko*, the absence of individual rights and obligations, together with 'the nature and broad logic of UNCLOS' prevented the Court from being able to assess the validity of a Community measure in the light of that Convention. It seems that the absence of direct effect causes the problem; the Court does not deny the legal status of the Convention within the EU legal order. The question may rightfully be posed whether the criterion of 'the governance of the legal position of individuals' – which seems to be relevant for the acceptance of direct effect<sup>126</sup> – would not virtually rule out the legal effects of most international law within the EU legal order and hence *de facto* limit the so much applauded monist attitude of the Union.<sup>127</sup>

A third argument used by the Court to limit the internal effects of international agreements relates to the possible existence of a dispute settlement mechanism in the agreement. However, the argument is not used in a consist-

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<sup>123</sup> Case C-377/02 *NV Firma Léon Van Parys v. Belgisch Interventie – en Restitutiebureau*, para 39, but established case law ever since *International Fruit* (see above). In Joined Cases C-120/06 P and C-121/06 P *FIAMM*, the Court confirmed its view.

<sup>124</sup> Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

<sup>125</sup> Case C-265/03 *Simutenkov*.

<sup>126</sup> Case T-174/00 *Biret International SA v. Council*; Case T-210/00 *Etablissements Biret et Cie SA v. Council*; Case C-93/02 P *Biret International SA v. Council*; Case C-94/02 P *Etablissements Biret et Cie SA v. Council*; Case C-265/03 *Simutenkov*; C-344/04 *IATA and ELFAA*. See more extensively and eloquently Cannizzaro, *op.cit.*

<sup>127</sup> Cannizzaro, *op.cit.*

ent manner. It played a role in a number of classic cases<sup>128</sup> before in *Portugal v Council*,<sup>129</sup> the Court held the following:

40. To require [domestic] courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis.

The idea was that the existence of a dispute settlement system in the WTO agreement was the proper forum for the Member States to settle conflicts related to the agreement.<sup>130</sup>

Again, however, one could argue that this does not affect the *status* of international agreements in the EU legal order. Yet, these exceptions seriously limit the *effects* of international law in concrete situations. In the words of AG Poiares Maduro:

the fact that WTO law cannot be relied upon before a court does not mean that it does not form part of the Community legal system. From this point of view, the formulation used by the Court in *Portugal v. Council* is undoubtedly unfortunate. It nurtures a belief that an international agreement does not form part of the body of Community legality, whereas it is merely a question of the provision's enforceability, of the jurisdiction of the courts to take cognisance of it.<sup>131</sup>

International law does not regulate its own status in the domestic legal orders of states or the legal orders of international organisations. Nevertheless, one may argue that the international principle of *pacta sunt servanda* may call for internal measures to allow the state or international organisation to live up to its international obligations. Whether this is done by accepting the international norms as valid norms in the domestic legal order or by transferring international norms into domestic law (or even by accepting a conflict between national and international obligations) is up to the state or international organisation.

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<sup>128</sup> Including Case C-469/93 *Chiquita*; Case 270/80 *Polydor*; and Case 24/72 *International Fruit*.

<sup>129</sup> Case C-149/96 *Portugal v. Council*.

<sup>130</sup> See also Case C-27/00 *R. v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Limited*.

<sup>131</sup> Opinion of AG Poiares Maduro of 20 February 2008, in Joined cases C-120/06 P and C-121/06 P *FIAMM*.

### 5.3 International customary law and EU law

In the previous sub-section we focussed on the status and effect of international agreements binding upon the EU. Yet, as we have seen, for instance, when the General Court in the *Kadi* case referred to *jus cogens*, the Court does take unwritten international law into account as well. The global ambitions of the EU as reflected by the Lisbon Treaty, in combination with the fact that the Union is not a party to many fundamental international agreements, call for a reassessment of the effects of international customary law on the Union. The treaties are silent on the status of international customary law in the EU legal order, but in quite general terms Articles 3(5) and 21(1) TEU (see section 1 above) hint at the idea that the EU considers itself bound by international law. Over the years, the Court has accepted the fact that the Community (and now the Union) was bound by international customary law. Yet, the hierarchical position of customary law was not regulated by the Lisbon Treaty and remains less clear.

In the landmark case *Racke*<sup>132</sup> the Court for the first time shed some light on the effects of international customary law in the EU legal order and the possibilities for individuals to invoke customary law to challenge an EU Regulation. This case was about the rule of *rebus sic stantibus* (a fundamental change in circumstances as a legitimate reason to suspend an international agreement) which is laid down in Article 62 of the Vienna Convention on the Law of Treaties. As the European Community was not a party to that Convention, the Court had to rely on the customary nature of that rule. Although in this particular case the Court held that there was no manifest violation of the law of treaties, it did not hesitate to state that ‘it is required to comply with the rules of customary international law’. In fact the last sentence of para 46 strongly resembles the legal status of international agreements, laid down in current Article 216(2) TFEU:

It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.

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<sup>132</sup> Case C-162/96 *Racke* (*op.cit.*), para 45; CFI, Case T-115/94 *Opel Austria GmbH v. Council*; as well as Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and Others*. See P.J. Kuijper, ‘Customary International Law, Decisions of International Organisations and other Techniques for Ensuring Respect for International Legal Rules in European Community Law’, in Wouters, Nollkaemper and De Wet, *op.cit.*, pp. 87-106; as well as J. Wouters and D. Van Eeckhoutte, ‘Giving Effect to Customary International Law through European Community law’, in J.N. Prinssen and A. Schrauwen, (Eds.), *Direct Effect*, Groningen: European Law Publishing, 2004, pp. 183-234.

As one observer holds: ‘Based on these observations, one can proceed on the assumption that it is unlikely that the EU system should adopt a very different approach in its relationship with international agreements and custom.’<sup>133</sup>

A similar reason can be found in *Opel Austria*.<sup>134</sup> Obviously, the obligation to respect international customary law holds in particular with regard to relations with third states (compare also Art. 3(5) referred to above). Unless we are dealing with *jus cogens* norms, the EU – in both primary and secondary law – may deviate from international law to regulate its relationship with and those between its own Member States.<sup>135</sup> This was the case, for example, with regard to the rule *inadimplenti non est adimplendum*,<sup>136</sup> or to the freedom left by international law to States in choosing the criteria upon which to bestow and maintain their citizenship<sup>137</sup> or to grant their nationality to ships.<sup>138</sup>

Recent case law on the one hand confirms the idea laid down in *Racke* that ‘the rules of customary international law [...] form part of the Union legal order’, but at the same time it is not completely consistent. The unambiguous statements in Articles 3(5) and 21 TEU indicating that the Union shall contribute to the strict observance and development of international law lead to the presumption that in its relations with other international actors the EU is bound by international law, be it written or unwritten. The question, however, is how this can be squared with the statement in *Kadi* that in the end priority should be granted to the constitutional principles of the EU itself. One answer is that at the time of the first *Kadi* case Articles 3 and 21 TEU did not yet exist. Yet, post-Lisbon the conclusion remains the same: the duty to respect international law amounts today to a constitutional principle of the EU.<sup>139</sup> Indeed, as revealed by the 2013 *Kadi* case (see below), the Court still has a task to balance this constitutional principle against other constitutional principles (including the protection of fundamental rights).

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<sup>133</sup> A. Gianelli, ‘Customary International Law in the European Union’, in Cannizzaro, Palchetti and Wessel, *op.cit.*, pp. 93-110, at 99.

<sup>134</sup> Case T-115/94 *Opel Austria GmbH v Council*.

<sup>135</sup> *Ibid.*

<sup>136</sup> Joined Cases 90-91/63 *Commission v. Luxembourg and Belgium*; Case 52/75 *Commission v. Italy*; Case 325/82 *Commission v. Germany*; Case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*; Opinion by AG Jacobs in Case C-228/00 *Commission v. Germany*.

<sup>137</sup> Case 41/74 *Yvonne Van Duyn v. Home Office*; Case C-369/90 *Micheletti v. Delegación del Gobierno Cantabria*, para 10; Case C-192/99 *The Queen v. Secretary of State for the Home Department ex parte Kaur*, para 19; Case C-200/02 *Zhou and Chen v. Secretary of State for the Home Department*; Case C-135/08 *Janko Rottmann v. Freistaat Bayern*.

<sup>138</sup> Case C-221/89 *R. v. Secretary of State for Transport (ex parte Factortame)*, paras 15-17.

<sup>139</sup> Gianelli, *op.cit.*, at 105.

A special kind of customary law is formed by *jus cogens*. While deviation from regular customary law is allowed between parties, this is not the case in relation to *jus cogens*, referred to by the General Court in the first *Yusuf* and *Kadi* cases (see above):

276. It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

277. None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

The words 'in principle', however, formed a reason for many commentators to start raising their eyebrows. Linguistically one could argue that the Court purported to point to a principle precluding a role for itself in the judicial review of Security Council resolutions. In fact, the subsequent sentence seems to support this view as the Court provides that it has 'no authority to call in question, not even indirectly' the lawfulness of Security Council resolutions. However, a few lines later the principle proves to be less firm than presented as the Court chooses not to have its own competences completely blocked by it. Upon its own initiative, it decided that it is 'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens* [...]' And, in fact, this is exactly what the Court did. In assessing whether the freezing of funds provided for by the contested regulation, and, indirectly, by the resolutions of the Security Council, infringes the applicants' fundamental rights, the Court considered that such is not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*. It is only an arbitrary deprivation of the right to property that might, in any case, be regarded as contrary to *jus cogens*. Irrespective of the fact that the Court left some room in relation to the content of *jus cogens* ('in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law'), it showed no hesitation to judge the lawfulness of the relevant Security

Council resolutions. In similar terms, the argumentation was used in relation to the right to be heard.

What would have happened if the Court had established that the Security Council had, indeed, violated *jus cogens*? Would the relevant resolution be void (cf. Art. 53 of the Vienna Convention)? Would the Court have had no alternative but to annul the relevant Regulation or declare it inapplicable? How would this have related to the obligation of the EU Member States to carry out the decisions of the Security Council? Could parts of the Regulation (i.e. the part of the Annex listing Yusuf and Kadi) be set aside? And, if so, could other (regional or national) courts or tribunals do the same? We can rest assured that the members of the Security Council would take their turn in raising their eyebrows. In the appeal cases, the CJEU agreed with the CFI that the Union would not be bound to give effect to norms violating *jus cogens*.<sup>140</sup>

Yet, as we have seen above, the CJEU argued that – apart from judging the compatibility with norms of *jus cogens*, it remains competent to assess the internal lawfulness of a regulation designed to give effect to UN Security Council resolutions: ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights.’ (para 285). This way, the Court did not have to check the lawfulness of the Security Council resolutions against norms of *jus cogens*; it simply relied on the constitutional principles of the EU itself.

In 2013 the CJEU released a final judgment.<sup>141</sup> The Court affirmed that it continues to review EU listings implementing strict Security Council obligations in the face of lack of equivalent control at UN level. It insisted on a rather strict standard of review of such listings, and it undertook – for the first time – substantive review of the reasons for listing offered by the EU. While this judgment certainly was a relief for those worrying about legal protection in the EU in the area of foreign policy and UN obligations, it will not put an end to the debate on how others will perceive the EU’s position as to its claim to make its own assessment in the light of binding Security Council resolutions.

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<sup>140</sup> See the *Kadi* case referred to above (Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*).

<sup>141</sup> Judgment in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Yassin Abdullah Kadi*, 18 July 2013.

## 5.4 The doctrine of consistent interpretation

The above analysis reveals the possibility of a direct effect of international law in the EU legal order. At the same time the case law of the European Court has introduced another possibility: *indirect* effect of international law. This mode of application is usually referred to as the doctrine of consistent interpretation.<sup>142</sup> Given the notion that agreements concluded by the EU form an integral part of the EU legal order, the principle of consistent interpretation did not appear out of the blue;<sup>143</sup> it is an elegant way of solving (potential) conflict between EU law and international obligations when international agreements lack direct effect (as is the case with the WTO agreements and, as we have seen, UNCLOS). The duty to interpret EU law in conformity with binding international law stems from the superior hierarchical status of international law within the EU legal order as discussed in section 3 above. The WTO agreements in particular have been a source of inspiration. The principle of consistent interpretation has been said to be relevant for the Anti-Dumping Agreement, the Anti-Subsidy Agreements and for the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).<sup>144</sup> In the *Werner* and *Leifer* judgments the Court argued that Article XI of the GATT was relevant for the interpretation of a Community Regulation establishing common rules for exports (Cases C-70/94 and C-83/94).

While these cases, just like *Commission v. Germany*, were about the lack of direct effect of the 1947 GATT and thus concerned the need to assess the indirect effect of provisions of an international agreement, in *Poulsen* the Court confirmed that this also holds true for international customary law.<sup>145</sup>

It is important to note that the principle of consistent interpretation not only applies in relation to the international agreements themselves, but equally to decisions flowing from those agreements. In general terms this was made clear by the Court in *Sevince* (Case C-192/89):

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<sup>142</sup> Case C-61/94, *Commission v. Germany*.

<sup>143</sup> In fact, a more implicit reference could already be found in Case 92/71, *Interfood GmbH*: ‘Since agreements regarding the Common Custom Tariff were reached between the Community and its partners in GATT the principles underlying those agreements *may be of assistance* in interpreting the rules of classification of it’ [emphasis added].

<sup>144</sup> Cases C-61/94 *Commission v. Germany*, para 52; C-286/02 *Bellio F.Ili Srl v. Prefettura di Treviso*, para 33; and C-49/02 *Heidelberger Bauchemie GmbH*, para 20.

<sup>145</sup> Case C-286/90, *Poulsen and Diva Navigation Corp.*



in order to be recognized as having direct effect, the provisions of a decision of the council of association must satisfy the same conditions as those applicable to the provisions of the Agreements itself.<sup>146</sup>

EU law should be interpreted in the light of the provisions in international decisions that are binding upon the EU. The main area concerns WTO decisions. Interpretation and application of WTO law is regularly influenced by the reports of the WTO Appellate Body and the Dispute Settlement Body. Although no case law is available as yet, it would make sense if not only the provisions of the WTO agreements themselves formed a source for interpretation of EU law, but also the authoritative application of them by the WTO bodies.<sup>147</sup> However, so far the Court has been hesitant to interpret EU secondary legislation in the light of WTO dispute decisions.<sup>148</sup> Yet, in general, decisions by international organisations have an impact on the EU legal order and may be of interpretative assistance.<sup>149</sup>

The duty of consistent interpretation may also be applicable in the domestic legal order of the Member States in the case of an agreement to which the Member States are a party. In *Commune de Mesquer* (Case C-188/07) the Court pointed to the possible necessity for Member States to interpret EU law in the light of international obligations to allow EU law to function well.<sup>150</sup> Similarly, in *Intertanko* (see above) it became clear that there is a role for the Court to prevent a clash between Member States' international agreements and EU obligations by way of a consistent interpretation.

The rationale behind the doctrine of consistent interpretation therefore seems to be the need to assure the principle of respect for international law.

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<sup>146</sup> See also Case 30/88 *Greece v. Commission*.

<sup>147</sup> G. Gattinara, 'Consistent Interpretation of WTO Rulings in the EU Legal Order?', in Canizzaro, Palchetti and Wessel, *op.cit.*, pp. 269-287.

<sup>148</sup> See for instance Case C-351/04 *Ikea Wholesale v. Commissioners of Customs & Excise*.

<sup>149</sup> See Wessel and Blockmans, *Between Autonomy and Dependence*, *op.cit.*

<sup>150</sup> Casolari, *op.cit.* at 401.

## 6 The European Union in the international legal order

So far we have mainly focused on the status and effects of international law in the EU legal order. However, as an international actor the EU will have to follow the international rules to be able and allowed to play along. Obviously, when concluding international agreements the EU will have to abide by the rules of international treaty law. In addition, three themes deserve special attention as they have gained in importance over the last few years, partly triggered by the EU's global ambitions reflected in the Treaty of Lisbon: the international responsibility of the Union, its new ambitions in the field of international diplomacy, and the related question of the EU's immunity under international law.

### 6.1 International responsibility

#### 6.1.1 The separate responsibility of the European Union

In section 1 we argued that, as an international legal person, the EU occupies a separate position in the international legal order. As we have seen, this position as an international actor implies that in its relations with third states and other international organisations the EU must adhere to the norms that make up that international legal order. This leads to the question of whether and to what extent the EU may be held responsible by its international partners in case of a violation of international law. This question may occur in relation to the EU's foreign, security and defence policy, but is also more general.

Since the entry into force of the Lisbon Treaty we are left with one international legal entity: the European Union. It is difficult not to regard this entity as an international organisation and hence within the scope of the Articles on the International Responsibility of International Organizations (ARIO) as adopted by the International Law Commission (ILC) of the UN in August 2011 and endorsed by the UN General Assembly in December 2011.<sup>151</sup> This latest version of the Articles is the latest stage in a development that started in 2002, when the ILC took up this project. Indeed, by now it has become widely accepted that the EU as such may bear international responsibility

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<sup>151</sup> International Law Commission (ILC), 'Draft Arts. on the responsibility of international organisations, with commentaries 2011', Adopted by the ILC at its sixty-third session, in 2011, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/66/10) (2011) *Yearbook of the International Law Commission*, vol. II, Part Two, 5, see in particular pt. 6 where the Commentary refers to Art. 57 of the Arts. on responsibility of States for internationally wrongful acts.

for an internationally wrongful act,<sup>152</sup> and it seems to fit the definition of an international organisation used in the ARIO: ‘For the purposes of the present draft articles, the term “international organization” refers to an organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to States, other entities.’

On the basis of Article 1, the Articles ‘apply to the international responsibility of an international organisation for an internationally wrongful act’; as well as ‘to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organisation’. Not being dealt with in the Articles on the responsibility of states for internationally wrongful acts, the latter paragraph is meant to incorporate *inter alia* those cases of State responsibility for internationally wrongful acts by an international organisation where a State is a member of that organisation, such as the Member States of the Union.<sup>153</sup>

The ARIO suggest as a point of departure that the EU is responsible for its own internationally wrongful acts. Article 3 states: ‘Every internationally wrongful act of an international organization entails the international responsibility of that organization’. Article 4 lists the conditions for an internationally wrongful act by an international organisation that entails the international responsibility of that organisation:

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributable to the international organization under international law; and (b) Constitutes a breach of an international obligation of that organization’. The next question is what conduct can be attributed to the Union.

According to Article 6(1):

The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

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<sup>152</sup> Cf. F. Hoffmeister, ‘Litigating against the European Union and its Member States’, *European Journal of International Law*, 2010, No. 3, pp. 723-747 at 724.

<sup>153</sup> See in particular pt. 6 of the ARIO Commentaries where the Commentary refers to Art. 57 of the Arts. on responsibility of States for internationally wrongful acts.

This somewhat obvious rule indicates that conduct by organs and agents can establish the international responsibility of the EU. According to Article 6(2), the ‘rules of the organisation’ shall be applied when determining the ‘organs and agents’. In view of the EU rules on ‘internal’ responsibility, there are good reasons to interpret the term ‘organs and agents’ as ‘institutions, bodies, offices and agencies and their servants’ as is used in the TFEU.<sup>154</sup> In any case, as is suggested by the broad definitions of ‘organs and agents’ in Articles 2(c) and (d), the Articles do not envisage the attribution of conduct to ‘depend on the use of particular terminology in the internal law’ of the Union.<sup>155</sup>

Yet, as we have seen, the EU is not a normal international organisation and the division of external competences is both complex and dynamic. One of the key questions therefore is how to divide the responsibility between the EU and its Member States. The responsibility of the Union in relation to the role of the Member States is dealt with in Draft Article 17.<sup>156</sup> What, for instance, happens if the Union adopts a decision which would force (or authorise) the Member States to commit an internationally wrongful act? The rules suggest that the EU *itself* could incur international responsibility both in the case of binding decisions addressed to the Member States and when the latter act because of an authorisation by the Union. It is important to realise that this Article applies to ‘circumvention’ *by the Union* and that hence the conduct of the ‘implementing’ Member State itself need not necessarily be unlawful; it is the binding or ‘authorising act’ of the Union that, if it were to implement that itself, should qualify as unlawful.<sup>157</sup> At the same time, Member States may be responsible once they hide behind an international organisation (Article 61).

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<sup>154</sup> Cf. Hoffmeister, *op.cit.*, at 740, who refers to Arts. 340(2) and 263 TFEU as well as to Art. 51(1) of the EU Charter of Fundamental Rights. Art. 10(2) confirms that also ‘the breach of any international obligation that may arise for an international organisation towards its members under the rules of the organisation’ is included in the Draft Arts. Ahlborn argues that this second paragraph could have been deleted, see: C. Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’, *International Organizations Law Review*, No. 2, 2011, pp. 397-482.

<sup>155</sup> Draft Arts. with commentaries, above, 17. The commentary invokes also some case law on the point such as the ICJ Advisory Opinion, *Reparation for injuries suffered in the service of the United Nations*, ICJ Reports 1949, 177, where the Court held that an agent is ‘any person through whom it [the international organisation] acts’.

<sup>156</sup> See NM Blokker, ‘Abuse of the Members: Questions concerning Draft Art. 16 of the Draft Arts. on Responsibility of International Organizations’ *International Organizations Law Review*, 2010, p. 35; as well as J d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, *International Organizations Law Review*, 2007, p. 91.

<sup>157</sup> Draft Arts. with commentaries, above, 40-42.

Irrespective of the notion that the EU itself can be responsible under international law for internationally wrongful acts, it is worth keeping in mind that it is quite difficult actually to enforce the rules. The immunity of international organisations in general makes proceeding before domestic courts extremely difficult. At the same time, the International Court of Justice may only rule in conflicts between states. This means that the role of the ARIO in establishing an international responsibility of the EU may be limited to an argumentative function.<sup>158</sup>

### 6.1.2 International responsibility in the case of mixed agreements

In relation to mixed agreements the question of responsibility is even more complex. After all, on the basis of international treaty law, third parties have a right to address both the EU and its Member States in cases of (perceived) violations.<sup>159</sup> When a declaration of competence (see above) has been drafted, this may guide third parties to the most appropriate addressee, but in other cases a general joint responsibility is to be assumed.<sup>160</sup>

Irrespective of the presumption of a joint responsibility it could therefore be argued that third states will have to take the division of competence between the EU and its Member States into consideration. After all, it is simply less practical to address Member States where the EU enjoys an exclusive competence. On the other hand – and this is the position we would take – third states cannot be expected to know and understand the ins and outs of the internal EU division of competences. In fact, demanding this from third parties could seriously hamper negotiations. Where the division of competences as well as the attribution of conduct can and should play a role internally once possible international responsibility arises, both the EU and its Member States should at least be willing to act as a ‘portal’ for international claims.

### 6.1.3 The responsibilities of the EU as a global security actor

Questions on responsibility may also emerge in relation to operations in the framework of the common security and defence policy (CSDP). The Lisbon Treaty described this policy area more extensively and it is presented as forming part of the Union’s common foreign and security policy (CFSP). Although most missions launched by the Union so far have been relatively modest in their size and objectives, even small-scale operations may give

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<sup>158</sup> Hoffmeister, ‘Litigating Against the European Union and its Member States’, *op.cit.*

<sup>159</sup> See also P.J. Kuyper, ‘International Responsibility for EU Mixed Agreements’, in Hillion and Koutrakos, *op.cit.*, pp. 208-228.

<sup>160</sup> Cf. G. Gaja, ‘The European Community’s Rights and Obligations under Mixed Agreements’, in D. O’Keefe and H.G. Schermers (Eds.), *Mixed Agreements*, The Hague: Kluwer, 1983, at 135. Cf. Case C-53/96 *Hermès v. FHT* and Case C-316/91 *Parliament v. Council*.

rise to a breach of international law or cause damage and injury to private parties. Yet holding EU missions accountable for their activities is hampered by a range of legal and practical difficulties.<sup>161</sup> One particularly thorny issue concerns the attribution of the wrongful acts committed by EU military operations: since they are composed of personnel made available to the Union by its Member States and third States, it is not immediately obvious which party—the EU, the contributing States or both—should bear responsibility for their conduct. This question is of great practical significance, for accountability cannot be discharged effectively if it is unclear where responsibility lies.<sup>162</sup>

As we have seen, as an international legal person, the EU bears responsibility under international law for any violations of its international obligations.<sup>163</sup> The conduct of military operations by the EU raises an important question: taking account of the EU's ambitions laid down in the current Treaties to contribute to global security governance, do the rules of attribution laid down in the Articles on the Responsibility of International Organisations (ARIO) provide an adequate system for allocating responsibility between the EU and contributing States? Whereas the European Commission played a visible role in the debate on the ARIO by pointing to the special nature of the Community, its contribution did not extend to the complex questions emerging from the role of the EU as a global security actor. One could argue that the way in which the ARIO purports to apply the rules on the allocation of responsibility to peace operations is too narrow. The rules on international responsibility as laid down in the ARIO focus exclusively on *factual control* as a ground for attribution, and the Commentary to the ARIO disregards the institutional and legal ties that may exist between national contingents and international organisations. This approach is inappropriate in cases where an international organisation incorporates national contingents into its own institutional structure, since such an act of incorporation gives rise to a rebuttable presumption

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<sup>161</sup> For example, it is not fully settled to what extent the EU is bound by the pertinent rules of international law, including those applicable during armed conflict. See F. Naert, *International Law Aspects of the EU's Security and Defence Policy*, Antwerpen: Intersentia, 2010, at 463-540.

<sup>162</sup> See more extensively A. Sari and R.A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in Van Vooren, Blockmans and Wouters (Eds.), *op.cit.*, pp. 126-141; as well as R.A. Wessel and L. den Hertogh, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?', in M. Evans and P. Koutrakos (Eds.), *International Responsibility: EU and International Perspectives*, Oxford: Hart Publishing, 2013.

<sup>163</sup> This also holds true for human rights law. A. Sari and R.A. Wessel (Eds.), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?* The Hague: CLEER Working Papers, No. 6, 2012.

that the conduct of national contingents is attributable to the international organisation rather than to the contributing States.

Whether or not such a presumption of attribution exists in the case of EU military operations depends on their status within the institutional and legal order of the EU. One may argue that the picture is a mixed one. The EU certainly enjoys the competence to incorporate military assets into its institutional structure and the Council is competent to establish military operations as its subsidiary organs. However, none of the legal acts adopted in relation to EU military operations provide clear evidence of the Council's intention to confer the status of a subsidiary organ on them. Since this intention cannot be presumed, we may be led to conclude that EU military operations are not *de jure* organs of the EU.<sup>164</sup> However, they may still be classified as *de facto* organs, provided that the Union exercises the necessary degree of control over them. Although EU operations do not satisfy the high threshold of complete dependence demanded by the International Court of Justice in its case-law, a strong argument can be made that they are subject to a particularly high degree of normative control by the EU and may be considered as its *de facto* organs on this basis. Accordingly, if our analysis is correct, a presumption exists in favour of attributing the conduct of EU military operations to the EU on the grounds that they constitute *de facto* organs of the Union.

A formal recognition by the Council that the conduct of EU military operations is attributable to the EU would signal to the international community that the EU is ready to accept that its growing global engagement as an international security actor brings with it a duty to act in an accountable manner.<sup>165</sup> The EU cannot entrust the implementation of its security and defence policy to its Member States and other parties and disavow responsibility for its adverse effects<sup>166</sup> or hide behind the effect control test set down in Article 7 ARIO. Accepting that the wrongful conduct of its crisis management missions engages the Union's international responsibility would not only better reflect the spirit of the principles laid down in Article 21 TEU (which includes respect for international law), but it could also serve as an example

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<sup>164</sup> Cf. N. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus and N. White (Eds.), *European Security Law*, Oxford: Oxford University Press, 2007, 102, 122; Naert, *op.cit.* at 355-357.

<sup>165</sup> See also Nigel D White, 'The EU as a Regional Security Actor within the International Legal Order', in Trybus and White, *op.cit.*, 329, 348.

<sup>166</sup> Cf. R. Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance', in M. Ragazzi (Ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 427-431, 431.

for other international organisations, including NATO,<sup>167</sup> and thereby make a broader contribution to the development of the law of international responsibility in this particular field.

## 6.2 The European Union's new diplomatic ambitions

Perhaps the most visible sign of the EU's new diplomatic ambitions in the Lisbon Treaty is the establishment of the European External Action Service (EEAS),<sup>168</sup> which has been called 'the first structure of a common European diplomacy'.<sup>169</sup> In the report of December 2011 evaluating the first year of the new Diplomatic Service, its foundation is viewed as an historic opportunity to rise above 'internal debates pertaining to institutional and constitutional reform', and instead to focus on 'delivering new substance to the EU's external action'.<sup>170</sup> When the EEAS is to deliver this 'new diplomatic substance', the Treaties obviously provide binding guidance on the method and substance of EU action in the world. But at the same time, everything will have to fit into the existing international legal framework.<sup>171</sup>

### 6.2.1 International representation

International representation is a core element of international (diplomatic) law. The first indent of Article 3(1) of the Vienna Convention on Diplomatic Relations (VCDR) lists as a task of Embassies: 'Represent the sending state

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<sup>167</sup> See U. Häußler, 'Human Rights Accountability of International Organisations in the Lead of International Peace Missions' in J. Wouters et l. (Eds), *Accountability for Human Rights Violations by International Organisations*, Antwerpen: Intersentia, 2010, pp. 243–251.

<sup>168</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010, L 201/30, 3 August 2010 ('EEAS Decision'). See also C. Hillion, *The European External Action Service: Towards a Common Diplomacy?*, Stockholm: Sieps Report 2010:6; and S. Blockmans, M. Cremona, D. Curtin, G. De Baere, S. Duke, C. Eckes, C. Hillion, B. Van Vooren, R. Wessel, and J. Wouters, *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service*, edited by S. Blockmans and C. Hillion, Brussels: CEPS / Stockholm: Sieps / Florence: EUI, 2013, 105 p.

<sup>169</sup> *Consular and Diplomatic Protection: Legal Framework in the EU Member States*, Report of the EU CARE project, December 2010, at 31; available at <http://www.careproject.eu/images/stories/ConsularAndDiplomatic-Protection.pdf>.

<sup>170</sup> European External Action Service, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, 2. See also S. Blockmans, 'The European External Action Service one year on: First signs of strengths and weaknesses', The Hague: CLEER Working Papers, No. 2, 2012.

<sup>171</sup> See more extensively R.A. Wessel and B. Van Vooren, 'The EEAS' Diplomatic Dreams and the Reality of International and European Law', *Journal of European Public Policy*, 2013; as well as G. De Baere and R.A. Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences', in J. Bátora and D. Spence (Eds.), *The EU's Diplomatic System: post-Westphalia and the European External Action Service*, Basingstoke: Palgrave MacMillan, 2014 (forthcoming).



in the receiving state'.<sup>172</sup> Several EU Treaty provisions provide a solid basis for the Union to establish a formal and substantive presence as a single, fully matured diplomatic actor represented in third countries and international organisations.<sup>173</sup> International representation can be defined in many ways, but we use it to refer to the process whereby a Union organ or institution acts on behalf of the EU.<sup>174</sup> As regards the physical presence through its delegations, EU activities are based on Article 221(1) TFEU, which was newly inserted with the Lisbon Treaty:

Union Delegations in third countries and at international organisations shall represent the Union.

The ambition flowing from this new provision in the TFEU should be quite clear: the Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the rotating Presidency.<sup>175</sup> The working group on external relations in the European Convention pointed out that too many spoke on behalf of the EU and that 'in diplomacy a lot depended on trust and personal relationships', which require a stable and coherent presence on the part of the Union.<sup>176</sup> The purpose of this new treaty provision was to have 'fewer Europeans and more EU',<sup>177</sup> e.g. a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally. When Catherine Ashton took up her post as High Representative in December 2009, she said that the EU Delegations 'should be a network that is the pride of Europe and the envy of the rest of the world' and 'a trusted and reliable ally on European issues'.<sup>178</sup> Speaking on Europe Day 2011 she underlined this continued ambition, that the EEAS should be a 'single platform to protect European values and interests around the world', and 'a one stop shop for our partners'.<sup>179</sup> Implementing this ambition has meant that the former

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<sup>172</sup> Article 3 (a) VCDR.

<sup>173</sup> Articles 220 and 221 TFEU *io* Article 3 (5) and 21 (1) TEU.

<sup>174</sup> Gatti and Manzini, *op.cit.*, at 1704.

<sup>175</sup> But see the EEAS document 'EU Diplomatic Representation in Third Countries – First Half of 2012', Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

<sup>176</sup> 'The European Convention, Final report of Working Group VII on External Action', *CONV 459/02*, Brussels, 16 December 2002, 321.

<sup>177</sup> A. Missiroli, 'The New EU Foreign Policy System After Lisbon: A Work in Progress', *European Foreign Affairs Review*, 2010, pp. 427-452.

<sup>178</sup> Catherine Ashton, 'Quiet diplomacy will get our voice heard', *The Times*, 17 December 2009.

<sup>179</sup> Catherine Ashton, 'Statement by High Representative Catherine Ashton on Europe Day', Brussels, 7 May 2011, A 177/11.

‘Commission Delegations’ have been turned into ‘Union Delegations’<sup>180</sup> and that for all practical diplomatic purposes they are seen as EU ‘embassies’.<sup>181</sup> In this respect, Heads of Delegations de facto act as ‘EU Ambassadors’,<sup>182</sup> with for example the letter of credence presented to President Obama by Mr Vale de Almeida opening with the words, ‘As I assume the role of the European Union’s Ambassador and Head of Delegation to the United States [...]’.<sup>183</sup> The EU Heads of delegations representing the Union in third states and at international organisations are thus conferred the authority to perform functions equivalent to those of national diplomats. In third states the EU aims at a status of the Heads of Delegation comparable to national Ambassadors and prefers to have them listed alongside the representatives of states rather than with the representatives of international organisations.<sup>184</sup>

Accreditation of EU Heads of Delegation largely follows the general rules of international diplomatic law. Yet, the presentation of the letters of credence reflects the complex and sensitive power sharing on the side of the EU: ‘on behalf of the European Council President *Herman van Rompuy* and Commission President *Jose Manuel Barroso*, and under the authority of the High Representative *Catherine Ashton* [...]’.<sup>185</sup> In the reverse situation, the EU also continues the traditions of inter-state diplomacy: It is now President Van Rompuy who receives the letters of credence of the Heads of Missions

<sup>180</sup> European External Action Service, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, 16 and see also F. Bergmüller, ‘The EEAS: A Loss for the European Commission’s External Relations Capacities?’, in P. Quinn, (Ed.), ‘Making European Diplomacy Work: Can the EEAS Deliver?’, *EU Diplomacy Papers* 8/2011, Bruges/Natolin: College of Europe, 2011, pp. 14-18.

<sup>181</sup> See also the view of the European Parliament: ‘The institutional aspects of setting up the European External Action Service’, European Parliament resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI), Art. 6(e), OJ C-265 E/9, 30.9.2010; and J. Wouters and S. Duquet, ‘The EU and International Diplomatic Law: New Horizons?’, *Hague Journal of Diplomacy*, 2012, pp. 31-49.

<sup>182</sup> J. Wouters and S. Duquet, *op.cit.*, who point out that this is granted as a ‘courtesy title’ by receiving states.

<sup>183</sup> See the introduction to the ‘Letter of Credentials from Ambassador Vale de Almeida to President of the United States Barack Obama’. An extract of the letter is available through the Press Release of the EU delegation to the United States, ‘New EU Ambassador presents his credentials’, *EU/NR* 35/10 (10 August 2012). See also F. Fenton, ‘EU Ambassadors: A New Creed?’, in Quinn (ed.), *op.cit.*, pp. 26-30.

<sup>184</sup> See K. Schmalenbach, ‘Die Delegationen der Europäischen Union in Drittländern und bei internationalen Organisationen’, *Europarecht*, Beiheft 2, 2012, pp. 205-215 at 212.

<sup>185</sup> See the Statement of the Presentation of Credentials by Mr Gilles Hervio, Ambassador and Head of Delegation of the European Union to Zambia, 3.2.2011 (available at [http://eeas.europa.eu/delegations/zambia/press\\_corner/all\\_news/news/2011/20110128\\_02\\_en.htm](http://eeas.europa.eu/delegations/zambia/press_corner/all_news/news/2011/20110128_02_en.htm)) See more extensively: Schmalenbach, *op.cit.*

to the European Union of third countries, accompanied with the usual (e.g. state-like) protocol and official photograph.<sup>186</sup>

The transformation from Commission delegations into Embassies proper was not purely formal, but was in some cases accompanied by added powers to at least some of those representations abroad. While all 139 Commission delegations<sup>187</sup> were transformed into EU delegations mere weeks after the entry into force of the Lisbon Treaty, 54 were immediately transformed into 'EU embassies' in all but name.<sup>188</sup> This meant that these 'super-missions' were not merely given the new name, but also new powers in the form of an authorisation to speak for the entire Union (subject to approval from Brussels); and the role to co-ordinate the work of the Member States' bilateral missions. Prominent exclusions among those 54 delegations were those to international bodies, of which there are eight: New York (UN), Geneva (UN and WTO), Vienna (IAEA, UNODC, UNIDO, OSCE), Strasbourg (Council of Europe), Addis Abeba (African Union), Paris (UNESCO and OECD) and Rome (FAO, WFP, IFAD, Holy Sea, and Order of Malta). The Union still has to work out how to handle EU representation in multilateral forums under Lisbon.<sup>189</sup> However, it is certainly the EU's ambition to expand these powers 'progressively' to other EU delegations as well.<sup>190</sup> This process can be followed in the regular reports on 'EU Diplomatic Representation in Third Countries' published by the Policy Coordination Division of the EEAS, and has been recently evaluated in the December 2011 report on one year of the

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<sup>186</sup> European Council, the President, 'Presentation of letters of credentials to President Van Rompuy', *EUCO* 9/12 (Brussels, 18 January 2012). Here President Van Rompuy received the credentials of the Ambassadors of Saudi Arabia, Rwanda, FYROM, Malaysia, Colombia, Peru, Turkey and Afghanistan.

<sup>187</sup> This is the latest number including the two newly opened delegations in Libya and South Sudan.

<sup>188</sup> Andrew Rettman, 'EU Commission "Embassies" Granted New Powers', *EU Observer*, 21 January 2010.

<sup>189</sup> *Ibid.* Similarly, Andrew Rettman, 'Ashton Designates Six New "Strategic Partners"', *EU Observer*, 16 September 2010, quoting an EU official on the importance of the EEAS for the role of Catherine Ashton in external representation: 'Lady Ashton has de facto 136 ambassadors at her disposal'.

<sup>190</sup> See for example: EEAS, 'EU diplomatic representation in third countries – second half of 2011', 11808/2/11 REV 2 (Brussels, 25 November 2011), and EEAS, 'EU diplomatic representation in third countries – first half of 2012', 18975/11 (Brussels, 22 December 2011). These documents always start with two paragraphs quoting Article 221 TFEU and an excerpt from the Swedish Presidency report on the EEAS of 23 October 2009, which set out the Member States' view on the scope of the EEAS in relation to the mandate of the High Representative. On that basis these reports continue by stating that the 'responsibility of representation and coordination on behalf of the EU has been performed by a number of Union delegations as of 1 January 2010, or later', and insofar as they have not taken over such functions, pre-Lisbon arrangements and the role of the Presidency continue to apply.

EEAS. The latter report states that EU delegations ‘have progressively taken over the responsibilities held by the rotating presidency for the co-ordination of EU positions and demarches’.<sup>191</sup> The report adds that this evolution has been a ‘mixed success’. It argues that the transition ‘has gone remarkably smoothly in bilateral delegations and has been welcomed by third countries’, though other reports are cautious.<sup>192</sup> As regards EU representation in international organisations, the EEAS evaluation report states that ‘the situation has in general been more challenging in multilateral delegations ... given the greater complexity of legal and competence issues’.<sup>193</sup>

As far as the privileges and immunities of the delegation are concerned (see also below), Article 5(6) of the 2010 EEAS Decision provides:

The High Representative shall enter into the necessary arrangements with the host country, the international organisation, or the third country concerned. In particular, the High Representative shall take the necessary measures to ensure that host States grant the Union delegations, their staff and their property, privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961.

This implies that, again, the starting point is that the EU follows the rules for states, rather than the rules for international organisations. The ‘arrangement’ agreed on by the High Representative and the third state thus allows for a special position of the EU, which in most cases clearly differs from that of other international organisations.<sup>194</sup>

So far, the representation by the new EU delegations has largely followed the pre-Lisbon practice which was developed on the basis of the experience with the Commission delegations. Representation by the Union did not replace representation by the Member States. Indeed, as Article 5(9) of the EEAS Decision provides: ‘The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.’

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<sup>191</sup> European External Action Service, ‘Report by the High Representative to the European Parliament, the Council and the Commission’, 22 December 2011, 6.

<sup>192</sup> *Ibid.*, 7. Kaczynski reports that there have been problems there too: in Washington, some national ambassadors apparently did not show up for local coordination meetings for months: P.M. Kaczynski, ‘Swimming in Murky Waters: Challenges in Developing the EU’s External Representation’, *FIIA Briefing Paper* 88, Finnish Institute of International Affairs, September 2011, 9.

<sup>193</sup> European External Action Service, ‘Report by the High Representative to the European Parliament, the Council and the Commission’, 22 December 2011, p. 8.

<sup>194</sup> Cf. Schmalenbach, *op.cit.*, at 213.

Yet, ongoing budget cuts may trigger Member States to close some of their own representations and to rely more on the new 'EU Embassies'. This may be unthinkable for most of the larger Member States at this moment, and the current EEAS legal regime does not yet include this option. Obviously, any transfer of powers will depend on the consent of the Member States, as they may have good reasons to continue a bilateral representation. After all, essential elements of a relationship between a Member State and a third state may not be covered by the EU's competences or a special relationship may exist between an EU state and a third country, either due to historical ties and/or geographic location.<sup>195</sup> Nevertheless, one medium-sized Member State has already openly discussed the possible benefits of a transfer of certain consular tasks and the collection of information to EU delegations.<sup>196</sup>

From the perspective of international law, 'outsourcing' of representation to an international organisation is not necessarily excluded. Apart from the internal division of competences, it remains difficult, however, to envisage the EU representing (one of) its Member States on bilateral issues. Strictly legally speaking, one may also wonder whether the EU delegations have been given the power to represent the Member States. Article 5(8) of the EEAS Decision merely allows the Head of Delegation 'to represent the Union in the country where the delegation is accredited'. When we define the 'Union' as the organisation of which the Member States are members (and hence excluding the Member States themselves), representation would thus be limited to those issues falling within the EU's competence.

### 6.2.2 Can the EU replace its Member States in diplomatic and consular relations?

Traditionally, diplomatic relations are established between states and the legal framework is strongly state-oriented. As an international organisation enjoying international legal personality the EU may enter into legal relations with states and other international organisations. At the same time, as we have seen, its external competences are limited by the principle of conferral, and in many cases the EU is far from exclusively competent and shares its powers with the Member States. Indeed, the TEU mandates that 'essential state functions'<sup>197</sup> of the Member States are to be respected by the EU and it

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<sup>195</sup> C. Cusens, 'The EEAS vs. the National Embassies of EU Member States?', in Quinn, *op.cit.*, 11-13 at 12.

<sup>196</sup> See the report by the Netherlands Ministry for Foreign Affairs, 'Nota modernisering Nederlandse diplomatie' (8 April 2011) at 10 and 18; available at <http://www.rijksoverheid.nl/documenten-en-publicaties/notas/2011/04/08/nota-modernisering-nederlandse-diplomatie.html>.

<sup>197</sup> Cf. Art. 4(2) TEU.

is in diplomatic relations in particular that one may come across these state functions.<sup>198</sup>

An important role for diplomatic missions abroad, as described in Article 3(1) VCDR, is to ‘Protect the interests of the sending state and its nationals in the receiving state – within the limits permitted by international law’.<sup>199</sup> There is a strong basis in the Treaties for EU ambitions on this front. Articles 3(5) TEU and 23 TFEU together provide the basis for diplomatic protection and consular assistance to EU citizens.<sup>200</sup> Article 3(5) TEU obliges the EU to protect the interests of its citizens abroad; and persons holding the nationality of a Member State are citizens of the Union (Article 20(1) TFEU). However, Member States are divided on how far the ambitions implementing these provisions would reach. In its most long-term version, if the Union were to achieve full diplomatic maturity, its most far-reaching implication *might* be that the EU would provide such protection as if they were ‘nationals of the EU’ for the purposes of international law. While Article 3(5) TEU could accommodate that interpretation, the role explicitly foreseen in the EEAS Decision for diplomatic protection and consular assistance by the EU does not, and, again, is merely supplementary:

The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.<sup>201</sup>

Yet, in March 2011, the Commission published a ‘state-of-play’ document on this issue, asserting that ‘the need of EU citizens for consular protection is expected to increase in the coming years’.<sup>202</sup> This does make sense, giv-

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<sup>198</sup> The EEAS Decision acknowledges this in Art. 5(9): ‘The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States’. See also B. Van Vooren, ‘A Legal-Institutional Perspective on the European External Actions Service’, *Common Market Law Review*, 2011, pp. 475-502, who points out that due to consistency obligations this should be read as a general obligation to cooperate between the EEAS and the national diplomatic services (at 497).

<sup>199</sup> Article 3, (b) VCDR.

<sup>200</sup> More specific rules as to the situations in which EU citizens should be able to make use of this right were laid down in Decisions 95/533/EC, OJ EC L 314/73, 1995 and Decision 96/409/CFSP, OJ EC L 168/4, 1996. A proposal for a new Council Directive replacing and updating these decisions was presented by the Commission on 14 December 2011 (COM(2011) 881 final).

<sup>201</sup> Art. 5(10) of the EEAS Decision.

<sup>202</sup> ‘Consular protection for EU citizens in third countries: State of play and way forward’, Commission Communication, COM-2011, 23 March 2011, 149 final, section 2.3.

en the fact that no less than 30 million EU citizens live in a third country and about 90 million foreign trips can be counted annually.<sup>203</sup> It argued that '[w]ith public budgets under pressure, the European Union and the Member States need to foster cooperation to optimise the effective use of resources.'<sup>204</sup> Some Member States have a strong interest in EU Delegations developing a capacity for consular support for EU citizens, whereas others are clearly opposed to the EU taking such a role, since they see this as a purely national competence.<sup>205</sup> But even the Commission is ambiguous about the role of the EU delegations in this area. In a proposal for a new Council Directive on consular protection for citizens of the Union abroad,<sup>206</sup> there is no clear distinct role for the Delegations and the focus remains on assistance by other Member States with a coordinating role for the EU Delegations, including in crisis situations.<sup>207</sup>

International law generally makes a distinction between consular assistance and diplomatic protection. Diplomatic protection 'consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' (Art. 1 of the 2006 Draft Articles on Diplomatic Protection). It is often considered to involve judicial proceedings, but protection of citizens may take different shapes, including the forceful protection by military missions.<sup>208</sup> Interventions outside the judicial process on behalf of nationals (issuing passports, assisting in transnational marriages, etc.) are generally not regarded as constituting diplomatic protection but as falling under consular assistance.<sup>209</sup> It is consular assistance that EU citizens mostly seek when they are in a third country and in need of some administrative action, both in peace time and in

<sup>203</sup> E. Tichy-Fisslberger, 'Der Schutz der EU-Bürger durch die diplomatischen und konsularischen Vertretungsbehörden', *Europarecht*, Beiheft 2, 2012, pp. 217-229 at 218.

<sup>204</sup> 'Consular protection for EU citizens in third countries: State of play and way forward', *op.cit.*

<sup>205</sup> European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, 7-8.

<sup>206</sup> COM(2011) 881 final, 14 December 2011.

<sup>207</sup> See also Tichy-Fisslberger, *op.cit.* at 228.

<sup>208</sup> See for an example J. Larik, 'Operation Atalanta and the Protection of EU Citizens: *Civis Europaeus Unheeded?*', in J. Larik and M. Moraru (Eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EU Working Paper LAW (2011/10), 129-144.

<sup>209</sup> See A. Künzli, 'Exercising Diplomatic Protection. The Fine Line between Litigation, Demarches and Consular Assistance', *Heidelberg Journal of International Law*, 2006, pp. 321-350.

crisis situations.<sup>210</sup> The need for diplomatic protection may arise when they run into legal troubles and a governmental intervention is requested. For the purpose of this paper it is not necessary to discuss the details of the distinction as we mainly aim to point to a general development, which indicates that the EU is increasingly involved in taking up these state functions.

Is it at all possible for the EU to play a state-like role in these matters? With the entry into force of the Maastricht Treaty in 1993, a European citizenship was created, and the ECJ even hinted at the idea of European citizenship being the primary identity of the nationals of the Member States.<sup>211</sup> The Lisbon Treaty did not change this starting point. On the basis of Article 23 TFEU, EU citizens are entitled to protection by the diplomatic and consular authorities of all Member States if their own country has no representation.<sup>212</sup> The experiences since 1993 are somewhat mixed. '[...] some States consider that very little has changed since the adoption of this provision, while others are more enthusiastic about it'.<sup>213</sup> This may be related to the somewhat ambiguous phrasing of Article 23, which regulates the protection of EU citizens by the diplomatic missions of other Member States. It has been noted that Article 23 merely reflects a non-discrimination clause as it basically states that protection is to be provided 'on the same conditions as the nationals of that state'. At the same time, the conclusion of international agreements is foreseen on the basis of which third states can accept protection and assistance by an EU Member State on behalf of nationals of another EU Member State. This practice has hardly been followed.<sup>214</sup> The fact is that, apart from the treaty provisions, the EU itself seems to be well on its way to further developing its capacities in the area of consular assistance. As an answer to the differences between the 28 national legal frameworks on consular and diplomatic protection, a common EU legal framework may be developed.<sup>215</sup> There are good reasons to believe that this development may have consequences for the

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<sup>210</sup> M. Lindström, 'EU Consular Protection in Crisis Situations', in S. Olsen (Ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin and Heidelberg: Springer, 2009, pp. 109-126.

<sup>211</sup> Case 184/99, *Grzelczyk*. See more generally on European citizenship: J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, Cambridge: Cambridge University Press, 2007.

<sup>212</sup> Cf. also Art. 46 of the EU Charter of Fundamental Rights.

<sup>213</sup> See A. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', *International and Comparative Law Quarterly*, 2011, pp. 965-995.

<sup>214</sup> *Ibid.* at 970-971.

<sup>215</sup> The Commission hinted at new legislative measures in 'Consular Protection for EU Citizens in Third Countries: State of Play and Way Forward', Commission Communication, COM(2011) 149 final, at 13, 23 March 2011. See also M. Moraru, 'The Protection of Citizens in the World: A Legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru, *op.cit.*, pp. 107-124, at 118.



diplomatic services of the Member States and that traditional international law is being sidestepped.<sup>216</sup> In that sense, Article 23 itself already forms a good example of a deviation from general international law, as it provides for the right of EU citizens to diplomatic and consular protection from Member States other than their State of nationality in the territory of a third country.<sup>217</sup>

One of the key problems is that the relevant international rules depart from the notion of ‘nationality’ defined as ‘the status of belonging to a state for certain purposes of international law’.<sup>218</sup> Indeed, ‘the criterion of nationality helps to recognise the entity that is both competent and accountable to act in the name of individuals vis-à-vis third countries.’<sup>219</sup> Diplomatic protection is closely related to nationality as, in principle, states can only protect their own nationals. In a classic case in 1937, the Permanent Court of International Justice argued:

In taking up the case of one of its nationals [...] a State is in reality exercising its own right [...]. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.<sup>220</sup>

While, it may be easier for states to cooperate in consular matters, which are generally of a more administrative nature, Article 23 TFEU not only provides a right to EU citizens to consular protection, but also to diplomatic protection. Public international law academics would argue that it is in particular this dimension that cannot be established by the EU unilaterally, given the non-existence of the concept of ‘European nationality’. After all, the essential ‘solid link’ between the intervening state and the protected citizen is missing. It has been argued, however, that the ILC Draft Articles on Diplomatic Protection establish minimum standards under public international law which permit the States to go beyond these rules as long as they respect the condition of obtaining the express unanimous consent of all the States involved in

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<sup>216</sup> Vermeer-Künzli, *op.cit.*

<sup>217</sup> P. Vigni, ‘The Protection of EU Citizens: The Perspective of International Law’, in J. Larik and M. Moraru (Eds.), *op.cit.*, at 92 and 101-102.

<sup>218</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Taylor & Francis, 2007, at 263. Cf. Art. 3 VCDR and Art. 5 VCCR.

<sup>219</sup> Vigni, *op.cit.*

<sup>220</sup> *Panevezys-Saldutiskis Railway Case*, PCIJ Rep Series A/B No 76, 16 (1934). Also in the *Nottebohm Case* (Second Phase) International Court of Justice Rep 4, 22 (1955).

the new model (both EU Member States and (at least implicitly also by) third states).<sup>221</sup> It is true that the general international rules apply ‘in the absence of a special agreement’ and obviously third states can simply agree to allow for the protection by states or the EU of non-nationals. In any case, under international law, the consular protection of a citizen by another State requires the consent of the receiving State (Art. 8 of the Vienna Convention on Consular Relations (VCCR): ‘Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.’)

Allowing the *European Union* to protect the nationals of its Member States would thus be a new step. As third states are not bound by EU law they will have to recognise European citizenship to allow the EU to protect or assist its citizens abroad.<sup>222</sup> The EU does not yet have competences in this area, but the Commission has been quite clear on its ambitions: ‘In the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations’.<sup>223</sup> Article 23 TFEU, which now only allows Member States to protect EU citizens with the nationality of another Member State, would then be a first step in a development towards the recognition of a role of the EU itself.<sup>224</sup>

It is difficult to envisage cases in which the EU itself would have a reason to protect EU citizens abroad. The Commission mentions the case in which EU citizens are not represented and may be in need of a ‘portal’ for further assistance.<sup>225</sup> Another situation may be when the protection of an EU citizen is required on the basis of an agreement that was concluded between the EU and a third state.<sup>226</sup> One may expect the EU Delegations to play a role in these situations in the future, but the extent to which the delegations can actually take up diplomatic and consular tasks ultimately depends on agreements that are to be concluded with the third countries. It has been noted that Member States will most probably not be too eager to hand over powers in this area to the EEAS and that a revised version of the 2010 EEAS Decision will not re-

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<sup>221</sup> See Moraru, *op.cit.*, at 122.

<sup>222</sup> Vigni, *op.cit.*, at 92.

<sup>223</sup> See ‘Effective Consular Protection in Third Countries: The Contribution of the European Union’, Commission Action Plan 2007–2009, COM(2007)767, 5 December 2007, final, at 10.

<sup>224</sup> A. Ianniello Saliceti, ‘The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services’, *European Public Law*, 2011, p. 91.

<sup>225</sup> See ‘Effective Consular Protection in Third Countries’, *op.cit.*, section 3.3.2.

<sup>226</sup> A case in point was Case C-293/95 *Odigitra AAE v. Council and Commission*.

veal any innovations in this respect. Yet, the European integration process has its own dynamic and Member States are also known to be pragmatic (in particular in times of (financial) crisis); coordination by the EU Delegations and a foreseen harmonisation of the diverging rules on the protection of nationals<sup>227</sup> may gradually lead to an increased role for the delegations in practice.

A final note concerns nationals of third states seeking diplomatic asylum at an EU Delegation. Where diplomatic and consular protection is aimed at a states' own nationals, diplomatic asylum may be requested by third country nationals in need of immediate protection. With the coming of age of the EU Delegations and their visible presence all around the world in crisis situations, the question of whether the EU is allowed to grant diplomatic asylum becomes more apparent. On the basis of the 'arrangements' between the High Representative and the third state, the premises of the mission shall be inviolable and the agents of the receiving State may not enter them, except with the consent of the head of the mission (Art. 22(1) VCDR). In practical terms this will allow the Head of the Delegation to provide physical protection to anyone present at the premises. In the absence of special provisions in the agreement with the third state the legal situation remains unclear, as domestic laws may conflict with the EU agreement as well as with other international legal instruments that may be applicable, such as human rights conventions.<sup>228</sup>

Despite its new ambitions, the EU will have a long way to go before it can actually take the place of its Member States in diplomatic and consular affairs. Internally, Member States will have to agree on a transfer of competences in this area, and it seems unlikely that many Member States would willingly outsource elements of the very fundamentals of being a state. Yet, they have been willing to do so in other areas and further developments in the EU (for instance related to a common asylum policy) may simply make it more practical for the EU to handle, for instance, some of the consular tasks.

However, it will be difficult to go beyond this in the short term. Whereas we have seen a pragmatic acceptance of a 'contracting in' strategy by the EU in the area of diplomatic *representation* (allowing for instance for Heads of Delegations to be accepted alongside states' ambassadors), the diplomatic

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<sup>227</sup> As was announced in Commission Communication (2011), *op.cit.* See also Moraru, *op.cit.*

<sup>228</sup> For the United States this formed a reason to demand a special provision in the UN Headquarters Agreement (Art. III, Section 9(b)), on the basis of which the UN 'shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavouring to avoid service of legal process.'

and consular *protection* of citizens is too much related to the notion of ‘nationality’. As one author noted:

EU citizenship has not yet acquired the status of nationality (or of a similarly solid link) at international level, so as to justify the intervention of any Member State for the protection of any EU citizen, regardless of his/her nationality. One cannot deny that, in recent years, there seems to be a development of the idea that a solid link may also exist between an EU citizen and his/her Member State of residence. However, international law does not seem to have recognised the legitimacy of these new developments occurring within the EU legal system.<sup>229</sup>

The practical implication is that third states will have to accept that the EU acts on behalf of its citizens. At the same time, the EU Member States do not seem to be willing to give up their traditional competences in this area: ‘consular protection is an area of Member State competence and Member State competence solely’.<sup>230</sup> As a consequence, ‘[r]ather than a zero-sum relationship, Member States and the EU as a collective foreign policy actor may operate along-side, across and in tandem with one another’.<sup>231</sup> While this may offer a solution for the short term, the EU’s ambitions seem to go beyond a mere coordinating role. International law does not per se block a further development of the EEAS (and its Delegations) in the area of diplomatic and consular protection, but further steps will not only have to be accepted by the EU Member States, but obviously also by third states (on the basis of bilateral agreements). It may be assumed that in the years to come a pragmatic acceptance of a new role of the EU will have an impact on the interpretation and perhaps even on the nature of international (diplomatic) law as primarily inter-state law.

### 6.2.3 EU/Member State representation at international institutions

Because of the succession of the European Community by the European Union, the Lisbon Treaty also changed the representation and participation of the EU and its Member States in other international institutions. Over the years the EU has obtained a formal position in some international institutions,

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<sup>229</sup> Vignu, *op.cit.*, at 102.

<sup>230</sup> Lindsröm, *op.cit.* at 122.

<sup>231</sup> J. Bátora and B. Hocking, ‘Bilateral Diplomacy in the European Union: Towards “Post-modern” Patterns?’, *Discussion Papers in Diplomacy*, The Hague: Clingendael Institute 2008, p. 6.

either as a full member or as an observer. It is generally held that participation in a formal international organisation relates to the participation in its organs; i.e. the right to attend the meetings, being elected for functions in the organ and exercising voting and speaking rights. In that sense the term 'position' is related to a formal influence on the output of the international organisation: decisions (often recommendations, in some occasions binding decisions) and conventions (international agreements prepared and adopted by an organ of an international organisation). In addition the EU participates in less formal international institutions (or regimes). The Lisbon Treaty heralds an increase of the engagement of the EU in other international institutions, including the future membership of additional international organisations such as the Council of Europe (Art. 6 TEU). In all these cases, not only the EU's own competences define its possibilities, but also the question of whether international rules (mostly laid down in the constituent documents of international organisations or in other multilateral treaties) allow for the participation of the EU.

The EU is a *full member* of a limited number of international organisations only, including the Food and Agriculture Organization (FAO), the World Trade Organization (WTO), the European Bank for Reconstruction and Development (EBRD), Eurocontrol, the Energy Commission, the Codex Alimentarius Commission and the Hague Conference on Private International Law. In addition it is also a *de facto* member of the World Customs Organization (WCO), and also its participation in the Organization for Economic Cooperation and Development (OECD) comes quite close to full membership. The OECD argues that 'this participation goes well beyond that of a mere observer, and in fact gives the Commission quasi-Member status' ([www.oecd.org](http://www.oecd.org)), despite the more modest formal arrangement that the European Commission 'shall take part in the work' of the OECD (Art. 13 of the 1960 Paris Convention in conjunction with Protocol 1). In 2013 the EU joined the Organization on International Carriage by Rail (OTIF).

Full participation is also possible in the case of treaty-regimes. Thus the EU (as such) has joined (or signed) a number of UN Conventions, including the Convention on the Rights of Persons with Disabilities, the UN Convention against Corruption, the UN Convention against Transnational Organized Crime and the UN Framework Convention on Climate Change. The North-west Atlantic Fisheries Organization (NAFO) reveals that it is even possible for the EU to become a member of a treaty regime without its Member States themselves being members.

*Observer status* implies that the EU can attend meetings of a body or an organisation, but without voting rights. Furthermore, the presence of an observer can be limited to formal meetings only, after all formal and informal consultations have been conducted with members and relevant parties. In addition, formal interventions may only be possible at the end of the interventions of formal participants, which may have an effect on the political weight of the EU.<sup>232</sup> In areas where the EU does have formal competences, but where the statutes of the particular international institution do not allow for EU membership, this may lead to a complex form of EU involvement. A good example is formed by the International Labor Organization (ILO). The 1919 ILO Constitution does not allow for the membership of international organizations. The existence of European Community competences in the area of social policy nevertheless called for its participation in ILO Conferences. The Community was officially granted observer status in 1989. The observer status allows the EU (represented by the Commission) to speak and participate in ILO Conferences, to be present at the meeting of the Committees of the Conference and to participate in discussions there. The status also allows for presence at the ILO Governing Body, where the Commission may participate in the Plenary as well as in the committees. However, it cannot become a party to any of the ILO Conventions.<sup>233</sup> This complex division of powers between the EU and its Member States in the ILO was addressed by the Court in *Opinion 2/91*.

This complexity has become more general given the increased activities of the EU in international institutions. Third states are not always pleased with the turf battles that may occur when the EU and its Member States fight for what they see as the politically correct way to present a Union position.

On the basis of Article 27(2) TEU, the EU High Representative for Foreign Affairs and Security Policy has been given a special role and ‘shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences.’ As we have seen, however, in many areas Member States enjoy individual competences in international institutions. Yet, they do have an obligation to coordinate their positions (under the guidance of

<sup>232</sup> F. Hoffmeister and P.J. Kuijper, ‘The States of the European Union at the United Nations: Institutional Ambiguities and Political Realities’, in F. Hoffmeister, J. Wouters and T. Ruys (Eds.), *The United Nations and the European Union: an Ever Stronger Partnership*, The Hague: T.M.C. Asser Press, 2006, pp. 9-34.

<sup>233</sup> R. Delarue, ‘ILO-EU Cooperation on Employment and Social Affairs’, in Hoffmeister, Wouters and Ruys (eds.), *op.cit.*, pp. 93-115 at 102.

the High Representative) and once there is a Union position, the High Representative or Member States present will have to uphold the Union position (Article 34(1)).

In fact, effective multilateralism to a large extent depends on the (coordinated) actions of the Member States. This explains, for instance, why the Treaty stresses the obligations of Member States to uphold the Union's positions in international organisations and at international conferences where not all the Member States participate. The need for coordination between the EU and its Member States (and their diplomatic missions and delegations) in international organisations returns in the obligation for the diplomatic missions of the Member States and the Union delegations to cooperate and to contribute to formulating and implementing a common approach (Articles 32 and 35 TEU). Interestingly enough, the Treaty for the first time also mentions 'Union delegations in third countries and at international organizations' which shall represent the EU (Article 221 (1) TFEU).<sup>234</sup>

Indeed, the unified diplomatic presence for the EU in multilateral fora post-Lisbon has so far proven highly problematic, in spite of the TFEU's specific legal obligation in its Article 220 (1) TFEU, which requires that the EU 'shall establish all appropriate forms of cooperation' with various international organisations including, but not limited to (Article 220 (2) TFEU), the UN, the Council of Europe, the OSCE and the OECD. On the basis of this provision, the EU has already begun to implement its ambitions in terms of presence in multilateral fora.

The saga of speaking rights at the UN General Assembly and EU participation in the UN concluded in May 2011 reflected the tensions between the need of the EU to be able to have a separate visibility and the unwillingness of many third states to accommodate this new situation. Over the years, empirical political studies have revealed the difficulties of presenting a common EU position in the UN General Assembly. It has been noted that 'national interest [drives] the policies of the EU countries and the processes within the

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<sup>234</sup> However, Member States seem to be somewhat anxious about the developments in this area. In a special declaration to the Treaty (No. 13) they stated the following: '[...] the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.' This declaration underlies the tension between, on one hand, the need to coordinate positions in international organisations and where possible have these presented by an EU representative and, on the other hand, the wish of many member states to maintain their own visible presence in international institutions.

CFSP at the UN. In New York, the CFSP-regime is simply an instrument for intergovernmental dealings between the EU MS [...] There is little room for a single European voice on the East River, i.e. for a truly *common* foreign policy.<sup>235</sup>

The recent attempts to upgrade the position of the EU to a ‘full participant’ with full rights to speak and make proposals met with opposition in the UN General Assembly.<sup>236</sup> The EU first sought to upgrade its observer status at the UN at the General Assembly meeting in September 2010, but after a much publicised failure only managed to do so by May 2011.<sup>237</sup> Even more difficult would be to set national sentiments aside in the UN Security Council. Nevertheless, a specific provision aims to ensure that CFSP outcomes are also taken into account by EU members in the UN Security Council (Article 32(2) TEU). Moreover, the Treaty allows for the possibility that the Union’s position is not presented by one of the EU Member States, but by the High Representative of the Union for Foreign and Security Policy. In that case the Member States that sit on the Security Council shall forward a request to that end to the Security Council. Given the traditionally sensitive nature of the special position of (in particular the permanent) members of the Security Council, this provision can certainly be seen as a further step in facilitating the EU to speak with one voice. Obviously, the ultimate decision to accept a presentation by the High Representative lies in the hands of the Security Council.

One particular situation is pointed to by Article 218(9) TFEU, on the basis of which the Council may, *inter alia*, adopt a decision establishing the positions to be adopted on the Union’s behalf in an international organisation. In 2012 this article was used by the Council as a basis for a Decision ‘establishing the position to be adopted on behalf of the European Union with regard to certain regulations to be voted in the framework of the International Organisations for Vine and Wine’ (IOVW).<sup>238</sup> While the Council may indeed adopt a decision to establish the Union’s position in an international organisation, in the

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<sup>235</sup> See for instance M.B. Rasch, *The European Union at the United Nations: The Functioning and Coherence of EU External Representation in a State-centric Environment*, Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 301

<sup>236</sup> M. Emerson and J. Wouters (2010), ‘The EU’s Diplomatic Debacle at the UN: and Now What?’, *European Voice*, 23 September 2010.

<sup>237</sup> See Catherine Ashton, ‘Statement by the High Representative following her call with UN Secretary-General Ban Ki-Moon’, A 162/10 (Brussels 18 August 2010), and Catherine Ashton, ‘Statement by the High Representative on the adoption of the UN General Assembly Resolution on the EU’s participation in the work of the UN’, A 172/11, Brussels, 3 May 2011.

<sup>238</sup> Council Document No 11436, 2012.



case of the IOVW, the EU itself is not a member. Germany therefore argued that Article 218(9) TFEU was the incorrect legal basis for the adoption of the decision. Article 218(9) concerns in the first instance only the adoption of the positions of the EU in bodies, set up by international agreements, of which the EU is a member. According to Germany, Article 218(9) cannot however be applied in relation to the representation of the Member States in bodies of international organisations in which only the Member States participate by virtue of separate international treaties. Second, Article 218(9) covers only ‘acts having legal effects’, meaning acts binding under international law. IOVW resolutions are however not acts in that sense.<sup>239</sup>

This case reflects the tension that may occur in relation to the question who may speak on behalf of the EU. With the EU wishing to establish its unified substantive diplomatic presence in multilateral fora, for some Member States – the UK notably – it has become problematic that the EU’s legal personality is now explicitly recognised by the Treaty (Article 47 TEU). While prior to the Lisbon Treaty the EU did already conclude many international agreements and could thus be argued to possess *implicit* legal personality, the ‘politically constructive ambiguity’ of ‘European Union’ allowed this label to function as a political umbrella term referring to the EC and its Member States. The fact that now Article 47 TEU explicitly gives legal personality to the EU has prompted the UK to deploy the argument that the terminology ‘EU’ can no longer be utilised to designate ‘EC and its Member States’ when delivering statements on behalf of the EU in multilateral fora.<sup>240</sup> The UK argues that because the Union’s legal personality has explicitly been recognised, ‘EU’ has become a purely legal concept. Therefore, it allegedly can no longer serve to represent areas covered both by EU and Member State competences as that might lead to a shift of competence to the Union. The Commission and several Member States strongly opposed this reasoning, which brought to a halt formal ‘EU’ representation in multilateral fora such as the OSCE and UN during the second half of 2011. During that time, several dozen EU statements and demarches were blocked over deep disagreement as to who delivers the statement: ‘the European Union’ or ‘the European Union and its Member States’. A temporary cease-fire, though not a permanent solution, was agreed on 24 October 2011 in the form of a document entitled ‘general arrangements for EU statements’.<sup>241</sup> Through this document the EU wishes

<sup>239</sup> See Case C-399/12 *Bundesrepublik Deutschland v Council of the European Union* (judgment expected in 2013).

<sup>240</sup> R.A. Wessel and B. Van Vooren, ‘The EEAS’ Diplomatic Dreams and the Reality of International and European Law’, *op.cit.*, at 4.

<sup>241</sup> Council of the European Union, ‘General Arrangements for EU Statements in Multilateral Organisations’, 16901/11, Brussels, 24 October 2011.

to keep competence battles ‘internal and consensual’<sup>242</sup> so that the EU may achieve ‘coherent, comprehensive and unified external representation’ in multilateral organisations. However, the time and effort spent on minutiae in Council Conclusions no less (‘EU representation will be exercised from behind an EU nameplate’<sup>243</sup>) shows how difficult it still is to achieve the ambition of the EU to be a diplomatic actor exhibiting these three qualities. Notably, the arrangement expresses a rather rigid interpretation of ‘international unity’ focusing on form rather than substance. This because it requires that each statement made in a multilateral organisation requires tracing who is competent for which area, and to ensure that the internal division of competences is adequately reflected *externally*, namely on the statement’s cover page and in the body of the text.

The point made by the UK – the EU is the name of the organisation of which the Member States are members and can therefore not include those Member States – seems legally correct. Yet, in practice the debates do not strengthen the diplomatic power of the EU as a cohesive force in multilateral diplomacy relations with the substance of the single message being of central importance. Time must now tell whether the EU, its own Member States, third states and other international organisations will be able to find ways to take the changing role of the EU as an independent international legal actor into account.

### 6.3 The European Union’s extra-territorial immunity

Although the ‘privileges and immunities’ form a classic theme in the law of international organisations,<sup>244</sup> studies on the immunities of the EU are very hard to find.<sup>245</sup> Yet, with the new post-Lisbon global ambitions of the EU, the classic institutional law theme of the immunities deserves to be addressed in the context of the EU as well.<sup>246</sup> After all, the more active the EU becomes in relation to non-EU states, the higher the chance that legal disputes will arise.

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<sup>242</sup> Ibid., 2.

<sup>243</sup> Ibid., 3.

<sup>244</sup> See for instance P.H. Bekker, *The Legal Position of International Governmental Organizations – A Functional Necessity Analysis of their Legal Status and Immunities*, Dordrecht: Martinus Nijhoff Publishers, 1994; A. Reinisch, *International Organizations before National Courts*, Cambridge: Cambridge University Press, 2000.

<sup>245</sup> With some exceptions in the francophone academic community, including M. Benlolo-Carabot, ‘Les immunités de l’Union européenne dan les États tiers’, *Annuaire français de droit international*, 2009, pp. 783-818; and S. Barbier and M. Cuq, ‘Les immunités de l’Union européenne’, in Benlolo-Carabot, *op.cit.*, pp. 407-427.

<sup>246</sup> More extensively: R.A. Wessel, ‘The Immunities of the European Union’, *International Organizations Law Review*, 2013 (forthcoming). Parts of this section return in that publication.

Article 343 TFEU provides for the regulation of privileges and immunities in the Member States. A similar provision can be found in Article 191 of the Treaty establishing the European Atomic Energy Community (EAEC or Euratom), an international organisation that is part of the EU family and shares its institutions. Yet, in this report we are more interested in the immunities the EU may enjoy under international law or in non-Member States. Rules on immunities allow international organisations to fulfil their objectives without running the risk of being tried before foreign courts. In the case of the EU, a special Protocol annexed to the Lisbon Treaty forms the backbone of the EU's legal regime in this area.<sup>247</sup> It *inter alia* deals with the inviolability of the premises and buildings of the Union, with tax issues, customs duties, and prohibitions and restrictions on imports and exports in respect of articles intended for its official use. In addition, rules are included on the treatment of diplomatic missions, with special privileges for members of the European Parliament, with the privileges, immunities and facilities of Representatives of Member States taking part in the work of the institutions of the Union, and with privileges for officials and other servants of the Union in the territories of the Member States. In addition to the rules on the privileges and immunities, the EU Treaty contains quite extensive rules on contractual and non-contractual claims. Irrespective of the general rules on immunities, the Union thus *a priori* accepts that it can be confronted with claims. On the basis of Article 340 TFEU, the contractual liability of the EU shall be governed by the law applicable to the contract in question.

The extensive rules on claims and in particular on the (exclusive) role of the CJEU in dealing with those claims underlines the special nature of the EU in this respect. Whereas most international organisations lack a judicial forum for individuals to bring claims, the EU's well-developed legal order allows any natural or legal person (*whatever his nationality or residence*) to institute proceedings against a decision addressed to him or which is of direct and individual concern. On the basis of Articles 263 and 265 TFEU, the CJEU can decide on the legality of acts of the European institutions that produce legal effects (or can establish a failure to act). Whereas the Court thus serves as a judicial forum for both EU Member States and their citizens and legal persons, its jurisdiction is limited by the Treaties. With respect to the Union's external relations, the most important exception concerns (most) acts adopted under the Union's common foreign and security policy (CFSP) and common

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<sup>247</sup> Protocol No. 7 on the Privileges and Immunities of the European Union.

security and defence policy (CSDP) (Articles 24 (1) TEU and 275 TFEU; see *supra*).<sup>248</sup>

More important perhaps, from the perspective of the current report, is the specific regulation of the EU's immunities in the international agreements concluded between the EU and a third state or other international organisation. The two most important types of agreements are agreements on the establishment of a Union Delegation in a third state or at an international organisation; and status of forces/mission agreements (SOFAs and SOMAs) in the area of the CSDP.

With regard to lawsuits in third countries, practice offers a variety of different situations ranging from traffic incidents involving EU delegation staff (where in each case the EU examines whether to lift immunity or not for the purpose of local proceedings) to criminal proceedings against an international contracted staff member of an EU mission, where the local authorities put the person in question in prison, in clear violation of the relevant provisions of the Status of Mission Agreement (but where the host country reminded the EU that the SOMA also calls for mission staff to respect local laws and where the staff member could only be released after some diplomatic effort), or the question of whether an employment contract with local personnel was concluded by the Head of Delegation in his private or official capacity.<sup>249</sup>

Indeed, lawsuits are brought before foreign local jurisdictions against the organisation itself or against EU staff. Similarly, the addressees of judicial documents can vary: some are directed against the EU as an organisation and/or against the European Commission as an institution, and/or against the EU delegation in a third country, or even against named Commission staff working in such delegations. In many instances the lawsuits relate to claims of private parties concerning the execution of programmes of financial and technical assistance, which the EU provides to non-EU countries. In such cases the EU can often rely on express provisions regarding jurisdictional immunity laid down in agreements with the host state regarding the establishment of the EU Delegation and in the relevant framework agreement concluded by

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<sup>248</sup> Cf. M. Brkan, 'The Role of the European Court of Justice in the Field of Common Foreign and Security Policy after the Treaty of Lisbon: New Challenges for the Future', in Cardwell, *op.cit.*, at 97-115.

<sup>249</sup> The analysis in this section is (admittedly sometimes literally) based on information provided by the European Commission in an informal note published in March 2010 (available online at [http://www.coe.int/t/dlapil/cahdi/Source/state\\_immunities/EU%20Immunities.pdf](http://www.coe.int/t/dlapil/cahdi/Source/state_immunities/EU%20Immunities.pdf)) as well as on discussions with colleagues at the legal services of the EU Institutions and bodies.

the EU with the beneficiary non-EU state regarding the provision of financial and technical assistance.

An example is the ruling of an Israeli court related to ‘commercial activities’ of the European Commission. The Jerusalem Magistrate’s Court dismissed a civil complaint against the European Commission filed by two plaintiffs following a public tender for the supply of trucks, tractors and waste disposal equipment for an area in the Palestinian Authority. The court opined that under Israeli law the European Commission is immune to the lawsuit because it is ‘an international organization’ [sic] recognised by Israel under a 1992 Decree of the Israeli Foreign Minister. In relation to the commercial nature of the issue, the appeal court held that

In this matter, publishing a public tender seeking bids to perform work does indeed contain elements of a contract, which is private law. However, we should remember that the petitioner [the European Commission] is not a sovereign state but an international organization with certain goals. Publishing the tender and the performance of the works constitute expression and materialization of these goals. Therefore, the acts of the petitioner must be regarded as being within the public-governmental authority of the petitioner, and therefore it is entitled to immunity.

It has been argued that if the European Commission were a sovereign state, it is likely that the lawsuit would proceed to a hearing on its merit, because sovereign immunity in Israel excludes commercial transactions. However, on the basis of customary international law ‘recognized organizations’ were said to enjoy an almost absolute immunity, covering commercial activities.<sup>250</sup>

The general starting point is that the EU invokes immunity in cases where the organisation itself is being sued. This means that unless the Union has expressly waived its immunity, it should be exempted from the local jurisdiction of municipal, judicial or administrative authorities and therefore should not be subject to suits, claims or enforcement proceedings in these domestic forums. Despite its frequent claim that it should not be equated with other international organisations, it is interesting to note that in these cases the EU often uses the argument that as an ‘international organisation’ its claim to

<sup>250</sup> See H. Carmon, ‘A Jerusalem Court Ruling: The European Commission Is Immune to a Commercial Lawsuit’, *DIPLAW: Diplomatic / Consular Law and Sovereign Immunity in Israel and World Wide*, 2009, available at <http://diplomatielaw.com/blog/2009/03/a-jerusalem-court-ruling-the-european-commission-is-immune-to-a-commercial-lawsuit/>. The author acted as a representative of the European Commission in this matter.

jurisdictional immunity is based on the rule of general (customary) international law which recognises that, like States, international organisations are exempted from the local jurisdiction of municipal judicial or administrative authorities and therefore are not subject to suits, claims or enforcement proceedings in domestic forums. The immunity invoked is based on the principle of functionality: i.e., immunity encompasses all acts needed for the execution of the official functions and activities of the organisation. Therefore, the foregoing applies, in the view of the European Commission, even in the absence of express provisions laid down in international treaties and even when not expressly provided for in municipal law.

It is interesting to note how readily the Commission relies on customary international law as a basis for the immunities of the EU. Apart from the fact that in many other occasions the Union continues to stress its *sui generis* nature in comparison to other international organisations, there is simply no extensive practice on which the claim can easily be based.<sup>251</sup> Practice reveals that in local court cases, the EU frequently refers to the 1961 Vienna Convention on Diplomatic Relations in arguments to support the immunity of its diplomats and staff members, despite the fact that the EU itself is not a party to the Convention.<sup>252</sup>

No case is known in which non-EU courts have pronounced expressly on questions relating to the jurisdictional immunity of the EU. Put differently, there is no indication that there is a single instance in which a non-EU court has denied the jurisdictional immunity of the European Union (or its predecessor, the European Community) from legal process. One reason may be that – as noted above – the EU’s legal system provides alternative remedies to which parties that have claims against it can have recourse. These alternative remedies are available irrespective of the nationality of the party concerned and irrespective of where the challenged EU activity took place.

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<sup>251</sup> See also Benlolo-Carabot, *op.cit.* at 802: ‘La pratique n’est évidemment pas suffisante pour conclure à une immunité de [...] l’Union sur une base coutumière.’

<sup>252</sup> Based on discussions with EU staff members and legal documents seen by the author.

## 7 Conclusions

The primary aim of the present report was to analyse the ways in which the EU interacts with international law from the perspective of the changes brought about by the 2009 Lisbon Treaty and to make this analysis accessible to a wider audience of both lawyers and non-lawyers. It was argued that in the post-Lisbon era in particular, the emerging picture reflects a struggle by the EU to further develop its ‘international actorness’, while being restrained by both the principle of the conferral of competences (on the basis of which the Union only has those competences which have been conferred upon it) and by the necessity to follow the rules of international law. We referred to the relationship between the EU and the international legal order as ‘the third dimension’ of legal relations (after the classical relationships between the States and international law and between the Member States and the EU). This third dimension is characterised not only by many different ‘encounters’ between the EU and international law, but also by a complex division of competences between the Union and its Member States or even a loss of former sovereign international competences (for instance, in the important area of international trade and in the future, perhaps, of diplomatic and consular powers).

It was claimed that the EU should be seen as an international organisation, albeit a very special one. The explicit codification of the Union’s legal personality by the Lisbon Treaty testifies to this. At the same time the classic notion of the ‘autonomy’ of the European legal order *vis-à-vis* international law proves to be ambiguous. The EU struggles with its wish to uphold its own constitutional values (as for instance reflected in the *Kadi* cases) and the global ambitions laid down more explicitly in the Lisbon Treaty. These ambitions call for a clearer and extended international role of the EU as such, which in turn confronts the organisation with an increasing number of existing international rules. As we have seen, the EU will have to abide by the international legal regimes on, *inter alia*, international treaty law, international (diplomatic) representation, international responsibilities and international immunities. Yet the many encounters between the EU and international law underline the special nature of this international organisation: in many cases the international rules that were made for states are more applicable to the EU than the rules on international organisations.

In a legal sense, the interaction between the EU and international law is perhaps best reflected in the fact that the EU concludes international agreements. While the preparatory Intergovernmental Conference leading up to the Lis-

bon Treaty made some attempts to draft a so-called 'Kompetenz-Katalog', the Treaty in the end merely refers to broad areas to delimit the competences of the Union and its Member States. At the same time, the Lisbon Treaty codified the 'ERTA principle', on the basis of which the internal division of competences *mutatis mutandis* applies to the external relations. Yet, the current procedure to negotiate and conclude international agreements continues to reveal the different interests of the Union and the Member States: while for reasons of consistency (and perhaps political weight) it would make sense for the Union to take the lead, Member States are not fully ready to give up their own position in the international order. A prime example is the WTO, an organisation of which all EU Member States are also members, despite the fact that virtually all competences in that area have by now been transferred to the EU. Indeed, 'mixed agreements' are still a part of the everyday life of the EU and from an international law perspective the question has arisen of the extent to which non-EU states need to be aware of the complex and dynamic division of competences between the EU and its Member States. In that sense it can be seen as a missed opportunity that the Lisbon Treaty has not been able to create a 'portal' function for the EU, to allow third states and other international organisations to deal with one actor only – allowing the EU, in turn, to settle matters internally.

This is not to say that internally the EU is immune from international law. The moment the EU is bound by an international rule, this may have an effect not only on the way it handles matters internally, but also on the rights of individuals and companies. The Court of Justice has always been quite clear that international agreements form an integral part of EU law. In return, the EU rules may affect non-EU actors, as for instance reflected in the recent case on EU rules on CO<sub>2</sub> emissions that are binding on foreign airlines flying to and from EU airports. While the CJEU in the *Kadi* cases (including its 2013 final judgment) clarified the relationship between international law and (constitutional) EU law, the fact remains that the issue has not been settled well by the Treaty. This should not come as a surprise: from the perspective of international law, the EU should simply live up to the international rules to which it is bound; from the perspective of EU law, however, it is difficult to set aside principles of EU law (including fundamental rights or key principles of the internal market) which are sometimes considered to be based on higher standards.

The Lisbon Treaty does not seem to have solved the key problems in EU external relations: the need for coherence (both within the organisational structure and in relation to the Member States), the complex division of external



competences, and the hierarchy between EU and international law. Nevertheless, the treaty potentially contributes to a more coherent EU approach to international norms. The new procedures on the conclusion of international agreements, the establishment of new institutional structures (such as the EEAS) and the new international orientation of the EU all form building blocks for a new and more unified structure. Yet, perhaps the best way to improve things would be for *non*-EU states and other international organisations to take a clear stance on how they wish the EU to behave externally. It is no less than surprising that the entire world continues to accept being confronted with an unclear and constantly changing division of competences, with courts not in agreement on whether or not the EU should follow international rules and with EU and Member States' delegations constantly quarrelling over speaking rights and representation in international organisations. A successor treaty to 'Lisbon' should take these issues into account and should allow the EU to function as a portal for external parties.

## 8 Sammanfattning på svenska

Trots sitt juridiska perspektiv har den här rapporten som mål att på ett lätt-tillgängligt sätt göra det möjligt att förstå hur EU-rätt och internationell rätt ”möts” i den situation som råder efter Lissabonfördragets ikraftträdande. EU anses ofta vara en unik (*sui generis*) organisation, men utan internationell rätt hade EU inte existerat och Europeiska utrikestjänsten (EEAS) hade inte kunnat genomföra de så kallade yttre åtgärderna. Lissabonfördraget, som trädde i kraft 2009, förstärkte ytterligare EU:s position i den globala rättsliga och politiska ordningen, men EU är inte den enda internationella aktören i Europa och EU-medlemskapet till trots är medlemsländerna fortfarande enskilda stater.

Ofta står medlemsländerna inför EU-rättsliga och internationella rättsliga skyldigheter som skiljer sig åt på grund av att yttre befogenheter har överförts från medlemsländerna till EU. Det har exempelvis varit helt legitimt att sluta investeringsavtal med tredjeland, men vad händer om befogenheten inom det området flyttas från medlemsländerna till EU, antingen på grund av en fördragsändring eller därför att EU plötsligt utövar en befogenhet man redan har? Tredjeländerna – det vill säga länder utanför EU, EFTA, EES och EU:s kandidatländer – är av naturliga skäl inte särskilt intresserade av hur det förhåller sig med befogenheterna inom EU, men medlemsländerna står tveklöst inför en ny situation.

Den bild som framträder – speciellt efter Lissabonfördragets ikraftträdande – återspeglar EU:s strävan att vidareutveckla förmågan att vara en internationell aktör. Samtidigt begränsas EU både av principen om tilldelade befogenheter (enligt vilken EU endast har de befogenheter man har tilldelats av medlemsländerna) och av behovet att följa reglerna för internationell rätt. Det vi ser är en vidareutveckling av vad man skulle kunna kalla den tredje dimensionen i rättsliga relationer. Innan den Europeiska gemenskapen (EG) grundades i slutet av femtiotalet hade medlemsländerna kontroll över sina yttre förbindelser, vilket innebar fulla (och exklusiva) befogenheter att ingå internationella avtal med andra stater. När EG grundades medförde det en annan typ av rättslig relation: delar av de yttre förbindelserna blev inre angelägenheter och relationerna mellan medlemsländerna och med EG blev underställda reglerna i EG:s (numera EU:s) fördrag. Vad gäller de yttre förbindelserna var medlemsländerna tvungna att dela befogenheter med EG/EU eller till och med förlora vad som dittills hade varit suveräna befogenheter (till exempel

inom det viktiga området utrikeshandel). Titeln på den här rapporten – Close Encounters of the Third Kind – syftar på denna tredje typ av relation: den mellan Europeiska unionen och den internationella rättsordningen. Rapporten lyfter fram de olika situationer där EU möter internationell rätt.

Det hävdas att EU kan och bör ses som en internationell organisation, och som internationell organisation är EU också underkastad internationell rätt i sina relationer med tredje land och andra internationella organisationer. Därför bör vi utgå ifrån antagandet att EU är bunden av såväl de internationella avtal man har ingått som den sedvanliga internationella rätten, vilket i sig berör själva kärnan i problemet med EU:s yttre förbindelser: vem företräder egentligen "Europas intressen" på den internationella scenen – EU eller dess medlemsländer? Och hur förhåller sig de åtgärder man vidtar till varandra – är de sammanhängande, ömsesidigt stödjande, eller rentav oförenliga? Talet om EU som "internationell aktör" används ofta som ett övergripande begrepp för en uppsättning doktriner, instrument och aktörer som täcker en rad områden. Något som i sin tur visar hur svårt det är att slå fast vem som agerar: EU, EU:s medlemsländer, eller båda samtidigt.

Rapporten granskar också frågan om EU:s påstådda 'autonomi' i ljuset av praxis (inklusive fallet Kadi\*) när det gäller hur internationell rätt påverkar EU:s rättsliga ordning. Med tanke på EU:s globala ambitioner – särskilt så som de har formulerats i de fördrag som har tillkommit efter Lissabon-fördraget – har frågan om den internationella hierarkin och EU:s normer blivit än mer relevant.

EU behöver instrument för att verka rättsligt på det internationella planet och där är internationella avtal EU:s i särklass främsta verktyg. Avtalen gör det möjligt för EU att spela med i den globala rättsordningen och etablera rättsliga relationer med tredje land och andra internationella organisationer. De reviderade fördragen föreskriver nya rutiner för hur man ska förhandla och ingå internationella avtal, med roller för nya aktörer som EU:s höga representant för utrikesfrågor och säkerhetspolitik. Såväl rutiner som praxis visar dock på de spänningar som fortfarande finns mellan EU:s institutioner, men också mellan EU och medlemsländerna. Det senare är särskilt tydligt när det gäller avtal inom områden där både EU och medlemsländerna innehar befogenheter. Inom dessa områden handlar "skyldigheten att samarbeta" om att vägleda såväl EU som dess medlemsländer när det gäller åtgärder man har fattat beslut om. Andra typer av avtal som leder till "möten" mellan EU och internationell rätt är associerings- och anslutningsavtal samt avtal om utträde

ur eller medlemskap i internationella organisationer. Samtidigt fortsätter internationell rätt att spela en roll vad gäller internationella avtal som ingås endast av medlemsländer.

Till det ska läggas tre områden som förtjänar särskild uppmärksamhet eftersom de har blivit viktigare under senare år. Det handlar om EU:s internationella ansvar, exterritoriella immunitet när det gäller rättsprocesser i tredje land och unionens ambitioner inom internationell diplomati. Alla tre områdena speglar den allt tydligare position som EU har intagit i den internationella rättsordningen och de ambitioner som återfinns i de fördrag som har tillkommit efter Lissabon-fördraget.

Vid det här laget är det allmänt accepterat att EU kan få ta ansvar för ett felaktigt internationellt agerande. Men EU är inte en internationell organisation som alla andra och uppdelningen av yttre befogenheter är en komplex företeelse. En av de viktigaste frågorna är därför hur man ska dela upp ansvaret mellan EU och dess medlemsländer. Frågan är relevant när det gäller det internationella ansvaret i samband med så kallade blandade avtal, men också när det handlar om vilket ansvar EU har som global säkerhetsaktör. Även om flertalet av de internationella insatser som EU hittills har initierat har varit relativt blygsamma, kan även småskaliga operationer leda till att man bryter mot internationell rätt, orsakar skada eller skadar enskilda parter. Att hålla EU ansvarig för felaktigheter i samband insatser stöter visserligen på en rad juridiska och praktiska svårigheter, men i och med att EU:s yttre åtgärder ökar måste unionens immunitet inför internationella och utländska domstolar ifrågasättas. Det är uppenbart att frågan inte har analyserats tillräckligt och i rapporten hävdas också att den framöver kommer att diskuteras mer frekvent.

EU:s nya diplomatiska ambitioner återfinns i Lissabonfördraget där man fastslår grundandet av Europeiska utrikestjänsten (EEAS), något som har kallats för 'den första strukturen för en gemensam europeisk diplomati'. Här stöter vi dock på frågan om i vilken utsträckning internationell rätt tillåter EU att agera som diplomatisk aktör jämsides med nationalstater, med tanke på att de flesta internationella regler inom diplomatisk och konsulär rätt grundar sig på mellanstatliga relationer. Frågan om huruvida EU ska ersätta medlemsländerna när det gäller diplomatiska och konsulära relationer bör för närvarande visserligen besvaras med nej, men det är uppenbart att utvecklingen på det här området går snabbt. Det kommer att vara upp till såväl EU:s medlemsländer som tredje land att acceptera att EU på det här området har en ny roll.

Det huvudsakliga syftet med den här rapporten är inte att bidra till den inomvetenskapliga diskussionen mellan jurister om detaljerna i förhållandet mellan EU-rätt och internationell rätt. Den diskussionen förs i facktidskrifter och i vetenskapliga publikationer. I stället tar rapporten upp frågor som är relevanta för en bredare publik som inte nödvändigtvis är experter på området och i det avseendet speglar den i huvudsak det faktiska rättsläget. En central del handlar om de ändringar som Lissabonfördraget innebär och hur de påverkar relationen mellan EU och internationell rätt. Slutsatsen är att Lissabonfördraget har potential att bidra till en mer sammanhållen inställning från EU:s sida när det gäller internationella normer, även om utvecklingen bara befinner sig i sin linda.

*\*Fallet Kadi syftar på EU-domstolens beslut 2008 att ogiltigförklara ministerrådets förordning om frysning av Yassin Abdullah Kadis och Al Barakaat Foundations tillgångar.*

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